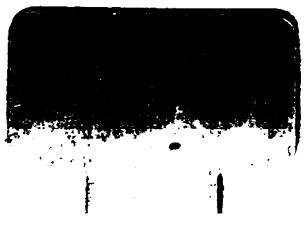
PATTEE'S

ILLUSTRATIVE CASES IN PERSONALTY.

PART II—SALES.



ILLUSTRATIVE CASES

IN

PERSONALTY.

BY

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PART II.—SALES.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
1894.

TABLE OF CASES.

CASES ON SALES

OF

PERSONAL PROPERTY.

A sale is a contract for "The transfer of the absolute or general property in a thing for a price in money." Darlington on Per. Property, 78; Benjamin on Sales (Ed. 1884), 1.

I.

THING TO BE SOLD.

A.

Actual Existence.

RUTHRAUFF *v.* HAGENBUCH.

Supreme Court of Pennsylvania, 1868.

58 Pa. St. 103.

READ, J. The plaintiff raised a crop of tobacco on the land of the defendant in 1863, on the shares. It was gathered, stripped, and stored in sheds on the farm of the defendant, and remained in the joint ownership of the plaintiff and defendant until the 18th of March, 1864, when they entered into the following agreement under seal:—

"Agreement entered into March 18, 1864, between Daniel S. Ruthrauff and Peter Hagenbuch, both of Union County, Pennsylvania, as follows, to wit: The said Ruthrauff hereby agrees to sell, and doth sell, unto the said Hagenbuch, in Turbut Township, being the undivided half of all the tobacco said

Ruthrauff raised on the said farm, at fourteen cents per pound. The said tobacco being herein and hereby now delivered by said Ruthrauff to said Hagenbuch—and the said Hagenbuch hereby agrees to sell the said tobacco for the best price that he can obtain for it—and whatever said Hagenbuch may obtain for said tobacco after paying all expenses for preparing the same for market, and selling over and above the said sum of fourteen cents per pound, he shall account for and pay to said Ruthrauff."

Upon this agreement are endorsed receipts for payments on the 4th December, 1863, January, 1864, and March 18, 1864, amounting to $110.08.

The tobacco remained on the land and in the possession of the defendant until the 17th March, 1865, when it was swept away by a flood, and the real question in this cause was what is the true construction of this agreement, which, of course, was for the decision of the Court.

The natural reading of this instrument would make the transaction a sale and delivery of the plaintiff's share of the tobacco to the defendant for a fixed price, to be increased, but not to be diminished, by the net proceeds of sale above that price, which could be fixed or made certain without difficulty. If this were a sale, then the defendant is liable to the plaintiff for the lost tobacco, and at the price of 14 cents per pound, the flood having rendered impossible the performance of the latter part of the agreement, which, therefore, becomes simply a sale for a fixed price.

This is strongly corroborated by the receipts for money endorsed on the agreement, the last on the very day of its execution. The counsel for the defendant, it is true, states that the defendant was the creditor of the plaintiff; if so, it makes the sale more evident, because, if it were not so, the plaintiff would lose the tobacco and still remain liable to the defendant, supposing the defendant to have been his creditor to the full value of the tobacco; and if it is a bailment or trust, then the plaintiff is still liable for that amount, having lost the very tobacco which would be said, according to the defendant's theory, to be simply a trust or agency on the part of the defendant.

The Court, therefore, erred in holding it not to be a sale,

but a transfer in the nature of a trust, and that the defendant was a mere trustee, holding the tobacco for the benefit of the plaintiff.

We think it was a sale, and the Court should have so instructed the jury.

Judgment reversed, and a *venire de novo* awarded.

B.

Potential Existence.

HULL *v.* HULL. 40 A. R. 165

Supreme Court of Errors, Connecticut, 1880.

48 Conn. 250.

LOOMIS, J. The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm in this State, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff.

No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin.

The sole ground upon which the defendant claims to hold these colts is, that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The Court below overruled this claim, and in so doing we think committed no error.

The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this State and elsewhere abundantly supply it: Lucas *v.* Birdsey, 41 Conn. 357; Capron *v.* Porter, 43 Id. 389; Spring *v.* Chipman, 6 Verm. 662. In Bellows *v.* Wells, 36 Verm. 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff.

In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, *partus sequitur ventrem*, applies.

We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear.

It is true, as remarked in Perkins on Conveyances (tit. Grant, § 65), that "it is a common learning in the law that a man cannot grant or charge that which he has not;" yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property, or interest, may be the subject of a valid present sale.

The distinction is illustrated in Hobart, 132, as follows: "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool

in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void."

It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal: 1 Parsons on Contracts (5th ed.), page 523, note *k*, and cases there cited; Hilliard on Sales, § 18; Story on Sales, § 186. In Fonville *v.* Casey, 1 Murphy (N. C.), 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in McCarty *v.* Blevins, 5 Yerg. 195, it was held that where A. agrees with B. that the foal of A.'s mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born sold and delivered it to D.

Before resting the discussion as to the plaintiff's title we ought perhaps briefly to allude to a claim made by the defendant, both in the Court below and in this Court, to the effect that if the plaintiff's title be conceded she is estopped from asserting her claim. This doctrine of estoppel, as all triers must have observed, is often strangely misapplied. And it is surely so in this instance. The case fails to show any act or omission on the part of the plaintiff inconsistent with the claims she now makes, or that the creditors of Murray or the defendant as representing them were ever misled to their injury by any act or negligence on her part. On the contrary, the estoppel is asserted in the face of the explicit finding that "as soon as the plaintiff became aware of the attachment of her horses she forbade the officer taking the same, and demanded their immediate return to her."

The only fact which is suggested as furnishing the basis for the alleged estoppel is that from the 1st of August, 1879, to the 12th of January next following, "no attempt was made by the plaintiff to maintain her title by suit, although she was

living during the time at Guilford, where said colts were." But who ever heard of an estoppel in an action at law predicated solely on neglect to bring a suit for the period of five months? To recognize such a thing for any period short of the Statute of Limitations would practically modify the statute and create a new limitation. Furthermore, in what respect have the defendant and those he represents been misled to their injury by this fact? The plaintiff never induced the taking of or withholding of her property. And can a tort-feasor or the wrongful possessor of another's property object to the delay in suing him for his wrong, and claim, as in this case, an estoppel on the ground that his own wrongful possession proved a very expensive one to him, amounting even to more than the value of the property. He might have stopped the expense at any time by simply giving to the plaintiff what belonged to her.

The single question of evidence which the record presents we do not deem it necessary particularly to discuss. It will suffice to remark that if the defendant's testimony was admissible to show that Murray, after the sale to the plaintiff (and so far as appears in her absence), claimed to own the mares and colts, it was a complete and satisfactory reply for the plaintiff in rebuttal to show that Murray's own entries (presumably a part of the *res gestæ*), in the appropriate books kept by him, showed the fact to be otherwise, and in accordance with the plaintiff's claims.

At any rate it is very clear that no injustice was done by this ruling to furnish any ground for a new trial.

There was no error in the judgment complained of and a new trial is not advised.

ARQUES *v.* WASSON.

Supreme Court of California, 1877.

51 Cal. 620.

CROCKETT, J. The action is replevin to recover from the sheriff certain grain and flaxseed seized and sold by him under an attachment and execution against one Hansen. The find-

ings show that Hansen leased from the plaintiffs a parcel of land, and from one Reed an adjoining parcel, of both of which he was in possession under the leases; that to secure the rent to be paid to the plaintiffs, and also a store account which he owed them, he duly executed and delivered to them a mortgage (which was duly recorded) upon all the crops of every kind to be produced on said lands during the next ensuing cropping season; that at the date of the mortgage Hansen was in possession of the land, but had not then plowed it or sowed the seed, but proceeded to do so very soon thereafter, and produced the crop which is in controversy; that when the crop had matured and had been partially harvested, it was seized by the defendant as sheriff, under an attachment at the suit of another creditor of Hansen, and was subsequently sold by the defendant under an execution issued upon the judgment in said action. The plaintiff recovered, and the defendant appeals.

The point chiefly relied upon for a reversal is, that at the date of the mortgage the crop had not even a potential existence, the ground not having been plowed or the seed sown; and it is claimed that there can be no valid mortgage of a thing not *in esse*. It is conceded by counsel that if the thing has a potential existence, as, for example, wool to be grown from sheep then belonging to the mortgagor, or butter to be thereafter produced from his cows, or a crop arising from seed already sown, the mortgage would be valid. The general rule undoubtedly is that a person cannot convey a thing not *in esse*, or in which he has no present interest. But it is quite as well settled, that if the thing has a potential existence it may be mortgaged or hypothecated. "If one, being a person, give to another all the wool he shall have for tithes the next year, this is a good grant, although none may arise, for the tithes are potentially in the person. . . . . So one may grant all the wool of his sheep for seven years; but not of the sheep which he shall thereafter purchase:" Van Hoozer *v.* Corey, 34 Barb. 12, and authorities there cited. "Land is the mother and root of all fruits. Wherefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant:" Grantham *v.* Hawley, Hob. R. 132. In Van Hoozer *v.* Corey, *supra*, the Court holds that "the same prin-

ciple is adjudged applicable to the annual crops, the fruit of the annual labor of the lessee, as if a lessor covenants that it shall be lawful for the lessee, at the expiration of the lease, to carry away the corn growing on the premises, although by possibility there may be no corn growing at the expiration of the lease, yet the grant is good, for the grantor had such a power in him, and the property shall pass as soon as the corn is extant." So there may be a valid grant of the grain that a field is expected to grow: 1 Parsons on Cont. 523; McCarthy *v.* Blevins, 5 Yerg. 195. In Van Hoozer *v.* Corey, *supra*, the grant was of the cheese expected to be made from the cows of the grantor, and "the products expected to be raised upon the premises then demised to the grantor;" and this was held to be a valid grant. In that case the question involved here was carefully considered by the Court upon a full examination of the authorities, and we are satisfied with the conclusion to which it arrived. But the same question arose in the later case of Conderman *v.* Smith, 41 Barb. 404, in which the ruling in Van Hoozer *v.* Corey was approved; and JOHNSON, J., in delivering the opinion of the Court, said: "That case, Van Hoozer *v.* Corey, like this, was an action by the lessor and purchaser, against a creditor of the lessee, who had taken and sold the products of the farm and dairy upon execution; and the Court held that it did not fall within the rule which prohibits the selling or mortgaging of property not in existence, or not owned by the vendor or mortgagor. It was the product of property which the vendor owned at the time, and was, as it is expressed in the books, potentially his, and, therefore, the subject of sale." On the rule established in these cases, the crop mortgaged to the plaintiffs had a potential existence, and the mortgage was valid.

Judgment and order affirmed.

1 Parsons on Contracts, § 523;
M'Carty *v.* Blevins, 5 Yerg. (Tenn.) 195;
Fonville *v.* Casey, 1 Murphy (N. C.) 386;
Allen *v.* Delano, 55 Me. 113;
Buckmaster *v.* Smith, 22 Vt. 203;
Sawyer *v.* Gerrish, 70 Me. 254;
Wilkinson *v.* Ketler, 69 Ala. 435;
Sanborn *v.* Benedict, 78 Ill. 309.
Heald *v.* Builders' Ins. Co., 111 Mass. 38.
Such sales respecting subsequent purchasers.
Butt *v.* Ellett, 19 Wallace, 544;
Pennington *v.* Jones, 57 Iowa, 37;
Gittings *v.* Nelson, 86 Ill. 591.

C.

Mere Possibility or Hope.

LOW *v.* PEW.

Supreme Judicial Court of Massachusetts, 1871.

108 Mass. 347.

MORTON, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees: Williams *v.* Merritt, 103 Mass. 184. The firm could not by a subsequent sale and delivery transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is, whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void: Jones *v.* Richardson, 10 Met. 481. The same principle is applicable to all sales of personal property: Rice

v. Stone, 1 Allen, 566, and cases cited; Head *v.* Goodwin, 37 Maine, 181.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his land, but not upon land in which he has no interest: 2 Kent Com. (10th ed.) 468, (641) note *a*; Jones *v.* Richardson, 10 Met. 481; Bellows *v.* Wells, 36 Verm. 599; Van Hoozer *v.* Corey, 34 Barb. 9; Grantham *v.* Hawley, Hob. 132.

The same principles have been applied by this Court to the assignment of future wages or earnings. In Mulhall *v.* Quinn, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In Hartley *v.* Tapley, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

The plaintiffs rely upon Gardner *v.* Hoeg, 18 Pick. 168, and Tripp *v.* Brownell, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the

oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The Court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered.

Judgment for the defendants.

2 Schouler on P. P. §§ 208, 209; Skipper *v.* Stokes, 42 Ala. 255; Hartley *v.* Tapley, 2 Gray, 565; Wilson *v.* Wilson, 37 Md. 1; Head *v.* Goodwin, 37 Me. 181; Brown *v.* Combs, 63 N. Y. 598.

Where one attempts to sell property to be afterwards acquired, and authorizes the vendee to take possession of it when so acquired, while no title passes by the sale, yet when the property is acquired and is taken into possession of the vendee, the title does pass by the act of such authorized seizure. McCaffrey *v.* Woodin, 65 N. Y. 459; Calkins *v.* Lockwood, 16 Conn. 276.

For the treatment of such sales in Equity, see—

Pattee's Illustrative Cases in Equity, pp. 37–41.

Cf. Wheeler's [illegible] v. Wheeler 2 Met. 474; 74 A.D. 421. H. owns a sale of interest "in the will of my father." & if he changes his [illegible] "my int. in the specified prop. whatever it may be".
held invalid sale

II.

PRICE.

In a contract of sale the *price* must be in money or money's worth, either paid or promised, and definitely fixed by the parties, or by them made capable of being definitely ascertained.

A.

Money.

GARTNER *v.* HAND *et al.*

Supreme Court of Georgia, 1891.

12 S. E. Rep. 878; 86 Ga. 558.

SIMMONS, J. It appears from the record that Hand & Co. wrote the following letter to Gartner: "Rome, Ga., ———, 1886. Carl Gartner, Hamburg, Germany—Sir: We can furnish a considerable quantity of oak, white and red, of good quality, 2, 3, 4 and 5 inches thick, 10 to 24 inches wide, 12, 14, and 16 inches long. If you are situated so that you can handle this lumber, we shall be glad to hear from you as to quantity you can handle, and price you can pay for the same." Gartner replied as follows: "Hamburg, 16th November, 1886. Messrs. F. C. Hand & Co., Rome, Ga., U. S. A.—Dear Sirs: I duly received your favor without date, and now beg to submit you the following trial order, viz.: 2 carloads oak planks, wagon stuff [describing]; price $40 per thousand feet, broad measure, delivered Rotterdam, less my commission of 5 per cent.; terms cash on arrival of the wood at Rotterdam less 2½ per cent., or three months' acceptance, your option. Please cable me on receipt of this your acceptance of this order, or best possible counter-offer. Shipment to be effected promptly.

[Further description of the timbers.] Awaiting your early cable, I am," etc. "P. S. Can you deliver oak floorings as per specification inclosed? Then please cable your cheapest price." Then follow specifications of marks and quantities of oak boards. The specifications are for six carloads of flooring and two carloads of wagon stuff. To this letter Hand & Co. replied by cable as follows: "Rome, December 16, 1886. Gartner, Hamburg: Wagon stuff, forty-two dollars; flooring, forty-one." Gartner replied by cable as follows: "Hamburg, December 17, 1886. Hand & Co., Rome, Ga.: Accept wagon stuff, floorings your prices, my conditions. Immediate shipment, cable confirmation." Hand & Co. replied by cable as follows: "Rome, Ga., December 18, 1886. Gartner, Hamburg: Shipment begins next week."

It appears from the record that, for some reason not stated, Hand & Co. refused to ship the timber to Gartner; whereupon Gartner filed a suit against them, alleging breach of contract, and setting out in his declaration the above correspondence, and in addition thereto a letter from him to Hand & Co., dated December 17, 1886, wherein he recites the correspondence by cable, and states his acceptance of the timber, and asks whether they will undertake to deliver regularly other kinds of timber, etc. A letter from Hand & Co. to Gartner is dated December 18, 1886, the same day as their telegram in which they state that the shipment begins next week. This letter recites the correspondence by cablegram, and says: "You will please understand that this order refers to the two carloads of wagon stuff without too large knots, and to cars of flooring marked 'K,' 'R,' and 'S.' And the letter then adds: "We can also fill order for balance of the cars of flooring in 30 to 40 days, but price will be a little higher." When the case came on for trial it was dismissed by the Court on demurrer, on the ground that the matters set forth in the declaration are not sufficient to enable the plaintiff to maintain his action against the defendant; and to this ruling the plaintiff excepted.

We think the Court erred in sustaining the demurrer to this declaration. It was argued by counsel for the defendant that the correspondence set out in the declaration clearly shows that there was no contract made between the parties; that their

minds did not assent to the same thing; and for that reason the judgment sustaining the demurrer was not erroneous. We cannot take this view of it. It seems to us that there was a clear and distinct agreement between these parties, one to sell, and the other to purchase, a certain quantity of timber. Hand & Co. wrote to Gartner informing him that they had certain wagon stuff for sale, and asking if he could handle it. Gartner replied that he would take two carloads of wagon stuff, and inquired if they could furnish oak boards for flooring (for which specifications were given), and, if so, to cable to him, and give prices. In reply, they cabled the prices for the wagon stuff and the flooring; of course, meaning the flooring the specifications of which he had sent them. Gartner replied, accepting the price, and asking immediate shipment; and they replied that the shipment would begin next week. Here, then, was an agreement between the parties as to the thing to be sold, its quantity and quality, and the price; and, according to this correspondence, the minds of both parties must necessarily have assented to the same thing It seems to us as clear and clean-cut a contract as could possibly have been made. But it is argued that when Gartner's last letter arrived it contained specifications of much more timber than he had ordered in his first letter, and that this shows that their minds did not assent to the same quantity and quality. We do not think the specification as to additional timber makes any difference as to the contract they had actually agreed upon. They had agreed upon the shipment of six carloads of flooring and two carloads of wagon stuff, and upon the price and quality thereof; and if Gartner subsequently ordered more at the same price, and of a different quality, the defendants were not obliged to fill the latter order. They were only bound to fill the order to which they had agreed, to wit, the order contained in the letter of December 16, 1886.

It was also contended by counsel for the defendant in error that the letter of Hand & Co. to Gartner, dated December 18, 1886, explanatory of their telegram of the same day, shows that the parties had not agreed upon the same thing. That letter states, in substance, that they only meant to fill the order as to two carloads of wagon stuff and three carloads of floor-

ing. We do not think this letter can be taken into consideration in determining whether or not the parties had made a contract; for, before this letter was written, Gartner had accepted the offer of the defendants by cable, and they had cabled him in reply that they would begin the shipment next week. When the last cable reply was sent, the contract was complete, and they could not change it by a letter written the same day, and forwarded to Germany by mail. It is quite likely that before the letter left the post-office at Rome, Ga., Gartner had received their cablegram in Hamburg, and upon the strength of that cablegram made the contract with other persons in Hamburg for the sale of this timber, which he alleges in his declaration he had made, and for a breach of which, caused by the non-delivery of this timber by Hand & Co., he had been sued, and a recovery had against him.

Judgment reversed.

DARLINGTON, P. P. §§ 77–78; Benjamin on Sales (1884), 3; 2 Schouler on Personal Property, § 211; Woodruff *v.* Graddy *et al.*, 17 S. E. 264.

B.

In Money's Worth.

Hale *v.* Hayes.

Court of Appeals, N. Y., 1873.

54 N. Y. 389.

Johnson, C. In my opinion, this is not a case of pledge. The clothing was never the property of Mrs. Earl. She owned a house and the defendant owned clothing. He was to have the house free of taxes for a certain quantity of clothing. When the time came for the transfer, she was unable to pay these taxes, and thereupon the written agreement, proved in the case, was made between them. By the terms of this agreement, Hayes was to retain part of the clothing, but was to deliver it to her, if, within a month, she paid the taxes; if

she did not, he was at liberty to pay them himself and keep the clothing. Hayes made her no loan; she gave him no security, for she did not own the clothing. It is true he held it as security, as a vendor holds goods sold as security for the unpaid price. There was no relation of borrower and lender, or of pledgor and pledgee. The real bargain was so much clothing for a house free from taxes, and so much less clothing if the taxes remained unpaid after thirty days. Just as a bargain to sell for so much, to be paid in cash, or so much more in case credit be given, does not make usury, so this bargain does not create the relation of pledgor and pledgee. Mrs. Earl's interest in the clothing not delivered was conditional on her fulfilment of the terms of the agreement. If she failed to pay and he *paid* the taxes, that was the end of it.

The Court at general term was right, and their order should be affirmed, with judgment absolute for the defendant.

All concur; LOTT, Ch. C., not sitting.

Order affirmed, and judgment accordingly.

BUCKMASTER *v.* SMITH.

Supreme Court of Vermont, 1850.

22 Vt. 203.

POLAND, J. The substantial facts of this case are as follows. In the spring of 1846 the plaintiff, being then the owner of the mare sued for, put her into the possession of Amos Pike, under an agreement that Pike was to pay the plaintiff four thousand feet of boards for her, of the value of $16, in the course of the then ensuing winter; and if the boards were delivered, the mare was to become the property of Pike; but until the delivery of the boards she was to remain the property of the plaintiff. The boards were never delivered, but the mare remained in the possession of Pike until the month of July, 1847, when she was attached by the defendant as the property of Pike, upon a debt against him. In the spring of 1848 the mare brought the colt which is sued for; and the plaintiff demanded the mare and colt of the defendant, before he brought his suit. The defendant offered to show that previous to said demand upon him

he offered and tendered to the plaintiff the sum of $16, and the interest thereon from the time Pike received the mare of the plaintiff, but the plaintiff refused to receive the same. This evidence the Court excluded.

The first question to be determined in this case is, whether Pike had any attachable interest in the mare at the time she was attached in July, 1847.

Under the doctrine that has been established by repeated decisions in this State, in relation to these conditional sales, the general property in the mare remained in the plaintiff, subject to be divested by the performance of the condition of payment of the boards by Pike; and the performance of this condition by him must precede the vesting of any title in himself: West *v.* Bolton, 4 Vt. 558. Nothing appears from the exceptions in this case, that there had been any new agreement, or understanding, between the plaintiff and Pike, as to his having any other or different right to the mare, beyond such as he acquired by the original contract. The time within which he was to deliver the boards had expired, and he had failed to perform the condition upon which depended all his interest in the mare; and we do not perceive how, as between himself and the plaintiff, he could have compelled the plaintiff to receive the $16 for the mare, or could have prevented the plaintiff from recovering the possession of her, discharged of all claim on his part, or, if he had converted the mare in any way, how he could have reduced his liability below the value of the mare. The creditors of Pike clearly could not, by attaching the mare, acquire any higher right to her than Pike had himself; and, as we view the case, Pike had at the time of the attachment no property whatever, either general or special, farther than a mere possession, in the mare, and no interest that could be attached. The plaintiff, being the owner of the mare, would also be equally the owner of the colt.

This view of the case seems to dispose of all the questions raised in it; for the tender by the defendant of the $16 and interest is based entirely upon the supposition that the plaintiff's claim was a mere *lien* upon the mare to that extent, which the defendant might, in the place of Pike, step in and remove by payment of that sum. The question as to the rule of dam-

ages is also raised upon the same view of the plaintiff's right; which we think is not supported by the facts appearing in the case. The cases of West *v.* Bolton, above cited; Bigelow *v.* Huntley, 8 Vt. 151; Grant *v.* King *et al.*, 14 Id. 367; and Smith *v.* Foster, 18 Id. 182, are all direct authorities in support of the view we have taken of this case.

It is urged by the defendant's counsel, that the effect of sustaining the decision below in this case will be to allow property to be placed and kept beyond the reach of creditors, and lead to the perpetration of frauds by dishonest debtors; and it is very possible that this suggestion may not be wholly unfounded; but we consider the doctrine of conditional sales, and of the rights of the parties under them, as too well settled in this State to allow any interference by the Court. If the contemplated evils shall be found to exist, the Legislature can easily provide a remedy.

Judgment affirmed.

Herrick *v.* Carter, 56 Barb. 41;
Flanagan *v.* Hutchinson, 47 Mo. 237.
Stocks—
Humaston *v.* Am. Tel. Co., 20 Wal. 20;
So. Australian Ins. Co. *v.* Randal, L. R., 3 P. C. 101;
Peckham *v.* Peckham, 13 R. I. 254;
Caldwell *v.* Yale, 11 Mich. 77;
Loomis *v.* Wainwright, 21 Vt. 520.

C.

Money Paid.

WOODRUFF *v.* GRADDY *et al.*

Supreme Court of Georgia, 1893.

17 S. E. Rep. 264.

LUMPKIN, J. In October, 1890, Graddy & Son, of Versailles, Ky., sent to George W. Woodruff, of Columbus, Ga., by mail, a sample of wheat, accompanied by a letter offering to sell him 10,000 bushels, to be delivered in November, "weights and goods warranted to within one per cent." Woodruff replied by telegram, asking the price of 10,000 bushels equal to sample,

and Graddy & Son, by telegram, quoted 5000 bushels at $1.17, whereupon Woodruff telegraphed them, saying: "Accepted like sample, and sweet. Await shipping instructions by mail." On the same day he offered by telegram $1.16 per bushel for an additional lot of 4000 bushels, "equal to sample," and this offer was accepted. He also wrote a letter saying that he accepted the 5000 bushels at $1.17, and stating therein "The wheat must be equal to sample, sweet and sound." Some additional telegrams and letters passed between the parties relating to the order for 4000 bushels, but these are not pertinent to the present discussion. Graddy & Son shipped the lot of 5000 bushels, and, according to Woodruff's evidence, about 800 bushels of the 4000, all consigned to their own order, and drew on Woodruff for the price of the wheat shipped, attaching to their draft indorsed bills of lading, which controlled the possession and delivery of the wheat. The draft was presented before the arrival of the wheat, and Woodruff refused to pay it, whereupon G. C. Graddy, one of the firm of Graddy & Son, went to Columbus, to see him about the matter, and insisted upon a payment on the contract. Woodruff still objected to paying the money until the wheat arrived. Graddy then assured him that the wheat shipped was as good as the sample, and upon the faith of this assurance Woodruff paid 90 cents a bushel upon the wheat which had been shipped, and Graddy delivered to him the bills of lading, which entitled Woodruff to receive the wheat from the railroad upon its arrival. This, we think, constituted an executed and complete sale of the wheat. By giving up the indorsed bills of lading, Graddy & Son parted with their title to and control of the wheat, and it became the absolute property of Woodruff. No other person then had the right to demand the wheat from the railroad company, and undoubtedly it would have been subject, as the property of Woodruff, to a judgment or other lien against him. Whatever may have been the legal effect of the letters and telegrams above referred to, and which led up to the consummation of the sale, we think the final terms thereof were embodied in the agreement made between Graddy and Woodruff at the time the latter paid the money, and received in return the bills of lading. If Graddy's assurance did not, under the circum-

stances, amount to an express warranty on the part of his firm that the wheat then en route to Columbus was as good as the sample in question, it certainly did at least raise an implied warranty to this effect; and the sale, as already shown, being executed, it was immaterial, for the purposes of this case, whether the warranty was express or implied. After this transaction, the wheat, in contemplation of law, was in Woodruff's possession, and was his property. What he did really amounted to an acceptance of it without inspection. When it finally arrived, no matter what its condition may have been, it was his wheat, and he had no right to rescind the contract and refuse to use it; nor was he under any obligation to offer to return it, but did have the undoubted right to stand upon the warranty he had received: Code, § 2652; Clark *v.* Neufville, 46 Ga. 261. In the case cited it was also held that, if there be fraud in the sale, the rule is different, and the vendee may rescind. The element of fraud, as a basis of rescission, is not referred to in the second headnote, in which it is ruled that a buyer cannot rescind without returning, or offering to return, the goods; but this headnote must, of course, be understood as applicable only in cases where the buyer has a right to rescind. Thus understood, the headnote and opinion fully sustain what is ruled in the case at bar.

Suit was brought by Graddy & Son for the balance due, at the contract price, on the wheat delivered, and for damages alleged to have been sustained by Woodruff's failure to accept the balance contracted for. The defence was that the wheat failed to come up to the sample by which it was sold, and was worth 15 cents per bushel less than it would have been if equal to sample, and Woodruff sought to set off and recoup against plaintiff's action the damages he had thus sustained. The charge of the Court on this subject, the substance of which is stated in the headnote, cut him off from so doing, for it was virtually admitted that he fully knew the condition of the wheat before he unloaded it from the cars and used it. The view of the trial Judge was that, if Woodruff, after examining and inspecting the wheat and discovering its condition, received it into his mill and used it, he should be held to have waived

any right to complain of its defective condition, and was bound to pay the full contract price. Whatever may be the law applicable in a case where the sale is executory, and it is not contemplated by the parties that it shall be complete until after inspection and actual and formal acceptance of the goods by the purchaser, we are quite confident that in the present case the sale was executed and fully consummated before the wheat arrived; that Woodruff, by accepting and acting upon the warranty of Graddy & Son, whether express or implied, and relying on the same in parting with his money, had waived his right to inspect the wheat or to reject it if found defective and not equal to sample; and it must follow as an inevitable conclusion that, being placed in this position, he could protect himself from loss by holding Graddy & Son to the warranty, and making them liable for a breach thereof. This, we think, accords both with sound law and with sound justice, and, as already stated, is supported by the Code and decision of this Court above cited. It is quite probable that the Court below treated the sale as being executory until inspection and formal acceptance of the goods, and counsel on both sides in the argument here seemed to take this view of it. But a thorough examination of the evidence has convinced us that, under the undisputed facts, the sale was really complete before the wheat ever arrived in Columbus, and we have therefore ruled upon the case accordingly. We have not, of course, intended to express or to intimate any opinion as to what was the actual condition of the wheat on its arrival, or whether it was or was not equal to sample. The plaintiffs below insisted that it was, and introduced testimony in support of this contention. The evidence offered by the defence was to the contrary. Whatever may have been the real truth upon this question, and even though the jury might have believed from the evidence that the wheat was in fact much inferior to the sample, the verdict rendered in favor of the plaintiffs was inevitable under the charge of the Court complained of, for it was not contended by Woodruff that he was not fully informed as to the condition of the wheat before he unloaded it from the cars and used it in his mill. The case should be tried over again upon the

line indicated, the jury being left to decide the questions of fact involved under proper instructions from the Court.

Judgment reversed.

D.

Money Promised.

ELLA M. HAYDEN *v.* THOMAS DWYER *et al.*

Supreme Court of Minnesota, 1891.

47 Minn. 246.

Statement of facts: One Steele sold to Ella M. Hayden certain horses, mules, and other chattels for $1330, she promising to surrender a note for $700 which she held against him, and also to give her note for $630, which latter note was to be delivered to Payne & Catling, attorneys, and then the property was to be delivered to her with a bill of sale thereof. She surrendered Steele's note and delivered her own as per agreement, but Steele, having meantime sold the property to Thomas Dwyer, who had notice of the previous sale, the delivery thereof to her was not made. Whereupon the said Ella M. Hayden brings this action against Dwyer and Steele to recover for the conversion of the said property.

GILFILLAN, C. J. There is in this case nothing in any assignment of error, based on exceptions taken, that requires special mention. As soon as plaintiff, under the agreement with Steele, left her note in the office of Payne, she had complied with the terms of the contract of sale of the property to her, the title passed to her, and she was entitled to the bill of sale, which after that time was in the hands of Payne as her agent. If Dwyer after that took a transfer from Steele, with notice that plaintiff had purchased the property,—as from the evidence the jury might have found, and as we must presume they did find,—then he could not be a *bona fide* purchaser, and it was immaterial that the possession of the property remained in the vendor.

Order affirmed.

E.

Price fixed by parties.

PADDOCK *v.* DAVENPORT.

Supreme Court of North Carolina, 1890.

12 S. E. Rep. 464.

SHEPHERD, J. Two causes of action are set out in the complaint, one for damages for breach of the contract, and the other for its specific performance. The Court held, upon demurrer, that neither of the said causes of action could be maintained.

1. As to the cause of action against the defendant, Davenport, we think that there was error in the ruling that the contract for the sale of the trees was void for want of consideration. The paper writing sued upon is substantially an offer to sell the trees at a certain price within 60 days. There being no consideration for the offer, it could have been withdrawn at any time within the period mentioned before acceptance by the plaintiff. The offer, however, was not so withdrawn, and, the plaintiff having accepted it within the stipulated time, it became a binding contract, for the breach of which the said defendant is answerable in damages: 1 Benj. Sales, 50, and the numerous cases cited in the notes. The offer of the plaintiff to pay the price, and mark the trees, and the refusal of Davenport to receive the money, and to allow the trees to be marked, was sufficient, in our opinion, to constitute a valid acceptance. There was, therefore, error in the ruling as to this cause of action.

2. The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiff. The true principle upon which specific performance is decreed does not rest simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensa-

ble in damages. The law assumes land to be of this character "simply because," says PEARSON, J., in Kitchen *v.* Herring, 7 Ired. Eq. 191, "it is land, a favorite and favored subject in England, and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, title-deeds, valuable paintings, articles of unusual beauty, rarity, and distinction, such as objects of *vertu*. A horn which, time out of mind, had gone along with an estate, and an old silver *patera*, bearing a Greek inscription and dedication to Hercules, were held to be proper subjects of specific performance. These, said Lord ELDON, turned upon the *pretium affectionis*, which could not be estimated in damages.[1] So, for a faithful family slave, endeared by a long course of service or early association, Chief Justice TAYLOR remarked that "no damages can compensate, for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart:" Williams *v.* Howard, 3 Murph. 80. The principle is also applied (2) where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the cirumstances of the case, that a specific performance is indispensable to justice. Such was formerly held as to the shares in a railway company, which differ, says the Court, in Ashe *v.* Johnson, 2 Jones, Eq. 149, from the funded debt of the government, in not always being in the market and having a specific value: also a patent (Corbin *v.* Tracy, 34 Conn. 325); a contract to insure (Carpenter *v.* Insurance Co., 4 Sandf. Ch. 408); and like cases. The general principle everywhere recognized, however, is that, except in cases falling within the foregoing principles, a Court of equity will not decree the specific performance of contracts for personal property; "for," remarks PEARSON, J., in Kitchen *v.* Herring, *supra*, "if with money, an article of the same description can be bought, . . . the remedy at law is inadequate." See, also, Pom. Spec. Perf. 14. Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the Court. The trees were purchased with a view to their severance from the soil,

[1] Not reported.

and thus being converted into personal property It is not shown that they have any peculiar value to the plaintiff, nor do there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the convenience of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased "a few trees of like kind," in the vicinity, sufficient to warrant the equitable intervention of the Court. We can very easily conceive of cases in which contracts of this nature may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the Court as to this branch of the case is sustained. As to the other cause of action, it is reversed.

Provision made by parties for ascertaining price.

McConnell *v.* Hughes.

Supreme Court of Wisconsin, 1872.

29 Wis. 537.

On February 7, 1870, plaintiff sold to defendant over 800 bushels of wheat at an agreed price of ten cents per bushel less than the price of wheat at Milwaukee, on any day thereafter which the ~~plaintiff~~ vendor should name, and he named March 24, 1870.

Lyon, J. The bill of exceptions does not purport to contain all of the evidence.

We cannot, therefore, review the evidence, but must presume that it sustains the findings of fact by the Circuit Court. That Court having found that the material allegations of the complaint were proved, it follows that if the complaint states a valid cause of action, the plaintiff was entitled to judgment.

We think that the complaint does state a valid cause of action. It avers that an executory contract for the sale and pur-

chase of wheat was made by the parties, and that, in pursuance thereof, the plaintiff delivered to the defendants, and the defendants accepted and received the wheat. It must be true that by such delivery and acceptance the title to the wheat became vested in the defendants, and the right to have the price therefor, when the same should be determined as provided in the contract, in like manner became vested in the plaintiff.

But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.

The contract furnishes a criterion for ascertaining the price of the wheat; leaving nothing in relation thereto for further negotiation between the parties. This is all that the law requires: Story on Sales, § 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge STORY, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if the plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point.

It is further argued that, after a valid sale and before payment of the price, there must be a debt owing by the vendee to the vendor, while in this case, until the price of the wheat was ascertained, there was no indebtedness. The latter part of this proposition is erroneous. As soon as the wheat was delivered, the defendants owed the plaintiff therefor. There was therefore a debt, but the amount thereof was not ascertained. It remained unliquidated until the price of the wheat was determined.

The objections that the assessor could not list the claim for the price of the wheat for taxation, and that the same could not be reached by garnishee process at the suit of a creditor of the plaintiff, while such price remained undetermined, present no

practical difficulties. The assessor would fix the value of the demand according to his best judgment, as in other cases of the valuation of property and credits; and the creditor in the garnishee proceeding would probably be subrogated to the rights of the plaintiff in respect to determining the contract price for the wheat.

By the Court.—The judgment of the Circuit Court is affirmed.

F.

Price submitted to referee.

NEWLAN *v.* DUNHAM.

Supreme Court of Illinois, 1871.

60 Ill. 233.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of assumpsit, brought by appellee in the Kane Circuit Court, against appellant. A trial was had by the Court and a jury, resulting in a verdict and judgment in favor of plaintiff, from which defendant has prosecuted this appeal. It appears that sometime in July, 1870, appellant contracted with appellee to sell him a quantity of hay in the stack, at $7 per ton, and that the parties mutually agreed that Lasher and Lynch should measure and ascertain the amount the lot contained, to be paid for in checks on Coffin & Tallman's bank, one-third in thirty, one-third in sixty, and the remaining third in ninety days; that the persons selected made the measurement, and determined the stacks contained one hundred and two tons. Appellee testifies that after they had signed the agreement appointing the persons to ascertain the amount, he and appellant agreed that five tons should be deducted on account of an injured spot in one of the stacks. This is denied by appellant.

When the persons selected for the purpose reported the amount the stacks contained, appellee offered checks upon the bank for the sum that ninety-seven tons of hay amounted to

at the contract price, but appellant refused to receive them or give him a bill of sale for the hay as requested by appellee.

It is first urged that the Court below erred in refusing to exclude plaintiff's evidence from the jury on account of a variance. The declaration avers the purchase of the hay in the stacks at a given price per ton, the amount to be ascertained by measurement made by the persons they chose, and that they ascertained the amount to be ninety-seven tons, whilst their report shows that they found the stacks to contain one hundred and two tons. It will be observed that the certificate of the amount of hay the stacks were found to contain is not declared on, or even referred to, in the declaration. And it has been held that, in such a case, where an instrument in writing is offered in evidence to prove an allegation, a variance cannot be relied upon for its rejection if it tends, substantially, to prove the averment: Prather *v.* Vineyard, 4 Gilm. 40; Wheeler *v.* Reed, 36 Ill. 81. This certificate, with the evidence introduced of the contract of the parties, shows that five tons were to be deducted and the remainder to be paid for, and this, substantially, sustains the averment. Ninety-seven tons were all they found appellee was bound to pay for, although there were one hundred and two tons in the stacks.

It is next urged that the Court erred in not permitting appellant to prove that there was a mistake in the computation of the number of tons of hay. In the cases of Canal Trustees *v.* Lynch, 5 Gilm. 521; McAvoy *v.* Long, 13 Ill. 147; and Central Military Tract Railroad *v.* Spurck, 24 Ill. 587, it was held that when parties selected a person to make computations, they were bound by his calculations; that it was, when made, conclusive upon the parties, and could only be impeached or questioned for fraud. But we are referred to the case of McAuley *v.* Carter, 22 Ill. 57, as holding that such a calculation or decision may be questioned for fraud or mistake. The rule is, that fraud in an award may be shown either at law or in equity, whilst mistake is only cognizable in the latter forum. A mistake could not be shown in this action, as it was at law. But even if it could be conceded that a mistake could be shown at law, still there is nothing in this record showing that the per-

sons making the calculation were clearly misled, deluded, or misapprehended the facts.

But, whether properly or not, the Court permitted the witnesses to give the basis upon which the computation was made; they stated the height, length, and breadth of the stacks, and the number of cubic feet they estimated was contained in a ton. Thus the jury had ample means to determine the accuracy of their calculation, and we will presume they tested its accuracy to determine whether there was any fraud, as the evidence was admitted for that purpose; as, if a gross discrepancy had appeared, the jury might have inferred that the computation was fraudulently made.

It is further objected, that the Court erred in refusing to permit appellant to prove the market price of hay in Aurora. We perceive no objection to this decision of the Court. The question was, what was the hay worth at or near the place where it was to be delivered, and not at distant points. Clintonville, and not Aurora, was the place where the transaction occurred, and where the delivery was to be made, and the price in that neighborhood should have controlled. In this there was no error.

It is also urged, that the Court erred in not requiring Lasher, at the instance of appellant, to make the calculation of the amount of hay in the presence of the jury. We know of no rule of evidence that would require a witness to make such a calculation, even where he might be required to state the basis and principles upon which he had conducted his calculation. If it was designed to show that he could not make the estimate, why not ask him if he could have done it? The witness had already stated that Lynch, and not himself, made the calculation; but, even if he had to depend upon Lynch for the purpose, we fail to perceive that it could have affected the rights of appellant, as the estimates were made by the man whom he had chosen, and the parties agreed to abide the decision of the arbitrators. We can see no force in this objection.

It is also objected, that appellant was not bound to deliver the hay because the checks were not properly stamped. This objection was not urged when they were offered, nor were they refused because they were not certified. The refusal was clear

and positive, on the ground that there was more hay than was estimated by the persons to whom it had been referred. It is manifest, from the evidence, that they would have been refused even had they been properly stamped and certified. If that had been the objection to receiving them, he should have made it when they were tendered. There is nothing in this objection.

Nor do we see any error in instructing the jury. The proper legal principles contained in those refused, were embodied in others that were given, and the other refused instructions, asked by appellant, were improper, and were correctly refused. The evidence warranted the finding, and we find no error in the record, and the judgment must be affirmed.

Judgment affirmed.

G.

Referee's failure to act.

SMYTH *v.* CRAIG.

Supreme Court of Pennsylvania, 1841.

3 W. & S. 14.

GIBSON, C. J. The statute by which the Court below is constituted, directs that when the defendant shall have given no evidence, the presiding Judge may direct a nonsuit, if the plaintiff's evidence be insufficient in his opinion to make out a case; and hence it results, not only that the evidence must be taken to be true, but that every inference of fact which a jury might draw from it in favor of the plaintiff, must be drawn by the Judge: else the plaintiff might be deprived of his constitutional privilege, and the statute would be so far void. In such a case, therefore, the defendant's prayer for a nonsuit is effectively a demurrer to evidence, with this limitation, that the Judge is not at liberty to give judgment for the plaintiff should he think the case made out: in that event the nonsuit is refused, and the cause is put to the jury. What then is the case which a jury might deduce from the evidence before us?

The defendant, Smyth, being pressed for payment by Craig, Bellas & Co., consented to let the molasses in question stand in

the yard of his distillery, either as their property, or as collateral security, but on condition that they would take his notes at sixty and ninety days, in lieu of the one-half cash, and the other at sixty days, as he had promised them. He pointed out the molasses, consisting of four hundred hogsheads, to be ascertained by counting them off in rows from a particular point, and in a particular way. He agreed to send them the rum he should distil from the article, to be sold by them and the proceeds applied to his debt; and on these terms, in the first instance, the matter was arranged.

Had it rested there, the plaintiff, or the firm he represents, could not have recovered as in the case of a pawn; for at this time there was no delivery of possession, and consequently no pawn. Indeed, retention of possession was necessarily a part of the arrangement, because it was indispensable to enable the defendant to carry the other parts of it into effect.

But subsequently to the defendant's failure, which occurred shortly afterwards, he sold and agreed to deliver to Craig, Bellas & Co., three hundred and fifty of these hogsheads, as well as twenty-five hogsheads of rum distilled in the mean time from the other fifty, and set apart in a shed, the whole to be gauged and the price fixed at their warehouse by Stevens, a grocer; and this done, the notes previously given were to be delivered up. Next morning he repeated the conditions of the sale, and told the purchasers to go to the yard and mark the hogsheads according to the former method of ascertainment, promising to meet them there, and directing them to haul away without further delivery should he fail to attend. They accordingly marked both the rum and the molasses with the initials of the firm; the notes were withdrawn from bank for delivery, but handed to the plaintiff, who had taken the place of the firm; and they were tendered to the defendant, who refused to receive them or part with the property. The question then is, whether there is enough in these facts to constitute a sale on the general principles of the contract unaffected by positive provisions, such as those of the British Statute of Frauds, which are not in force here.

The subject of the sale was sufficiently certain. The rum was in a shed by itself; and the rows of hogsheads containing

the molasses were particularly designated. Even without such designation, the lot would have been sufficiently ascertained by the marking, pursuant to the vendor's direction. A sale of articles to be selected by the vendee is certain enough, after selection made. Here the particular hogsheads had been marked by the vendor's assent, and whether with a view to delivery, it was properly the province of the jury to say; for that the separating of particular goods from a larger quantity, preparatory to actual delivery, is constructive delivery in point of law, was affirmed by Lord LOUGHBOROUGH in the celebrated case of Lickbarrow *v.* Mason, 1 H. B. 363, and here the hogsheads were marked expressly by the vendor's direction, in order that the vendees might take possession of them without any further act to be done by him. So far then as the fact of delivery is involved in the question, the sale seems pretty clearly to have been executed; but the fact is nevertheless determinable by a jury having regard to the intention of the parties in the marking and separation.

The pinch of the case, however, is to determine whether the vendor was at liberty to stop short before the contract was made complete in all its parts by the ascertainment of the quantity and price, through the agency of him to whom the gauging and valuation were referred. If I deliver a chattel on terms that the price of it be subsequently fixed by the vendee and myself, I may balk the contract by insisting on more than he will be willing to give for it, and thus regain the possession of my property with which I had parted only conditionally. But though the price be not settled by the parties, yet if they agree on a method of settling it irrespectively of anything to be done by themselves, it is the same between them when subsequently settled as if the sum to be given had been an original condition of the bargain; but if the person to whom the naming of it was referred die in the mean time, or refuse to act, the contract is at an end. Such a sale is conditional, but not executory like a contract to sell at a day to come, which is complete in itself, though some act remain to be done in pursuance of it: on the contrary, it is a contract, which, being imperfect in itself as regards one of its terms, is to take effect only when the deficiency is supplied by the performance of a

condition precedent, the prevention of which by an act of Providence or the obstinacy of the agent defeats the sale entirely. Nor does the property pass by it, in the first instance; for the sale, being on a condition precedent, does not allow the title to vest before the condition has been performed, and therefore if the vendor sell the thing again in the mean time, the second purchaser will take it clear of dispute, though the vendor will be answerable in damages when the price is named. All this is text law, and so well understood, both by civilians and common law jurists, that no more is necessary than to refer to Ross on Vendors, p. 60, where the authorities for it may be consulted. But here the rum and molasses were to be gauged, and the price fixed at the purchaser's warehouse; an act that was prevented by the vendor's retention of the property in his actual custody. There is no precedent in the books for such a case; and it is not easy to determine it satisfactorily on principle. The difficulty is to comprehend why such an authority, like a submission to an arbitrator, or a letter of attorney, may not be revoked before it has been executed. It is settled, however, that a power coupled with an interest in the execution of it, is irrevocable; as in Walsh *v.* Whitcomb, 3 Esp. Ca. 565. In Bromley *v.* Holland, 7 Vez. 28, it was said by Lord ELDON, that he would not permit a power of attorney given for a valuable consideration to be revoked; and the principle seems applicable to every case where the power is necessary to effectuate a security. Was the power given for that purpose in this instance? It was given to effectuate a sale in discharge of a debt. If the notes had been actually delivered up, the contract would indisputably have been executed on the part of the vendees; but independent of that, the debt, of which the notes were only the evidences, had been taken as the consideration of the purchase, and the sale may still be said to have been executed so far as regards tender of those evidences and payment of the purchase-money. In addition to this, the vendees had been lulled into a false security by the arrangement, at a time when a vigilant use of every instant in seeking other security was of peculiar value to them; and to suffer the vendor to rescind the contract by a trick, when the time for action had gone by, would be to sanction a fraud. Still it may be asked,

how is it to go into effect before performance of the act which was a condition precedent to it? Simply by taking prevention for performance, as is often done in regard to dependent covenants, and directing the jury to allow the vendor a reasonable price for the articles in their estimate of the damages. By this means, the bargain may be carried into effect; and if the vendor should be deprived by it of the benefit of Mr. Stevens' judgment, he will have himself to blame for it.

Judgment reversed, and *procedendo* awarded.

H.

Withdrawal of proposition submitted to referee.

HUMASTON *v.* TELEGRAPH CO.

Supreme Court of the United States, 1873.

20 Wall. 20.

Mr. Justice DAVIS delivered the opinion of the Court.

Whether or not the Court erred in its charge, and in the exclusion of the evidence excluded, depends on the proper interpretation of the contract and the rule of damages which shall be applied in this action to the breach of it.

It is insisted by the plaintiff that the defendant promised to pay him for his invention four hundred shares in addition to the one hundred shares paid on the delivery of the title, unless the arbitrators should relieve the company by fixing some less amount, and a great deal of learning touching the doctrine of conditions subsequent and precedent has been invoked in support of this position. But this doctrine has no application here, for, manifestly, this is not an undertaking to which a condition subsequent could be attached. It is easy to determine why this contract was made, the nature of it, and the acts to be performed by the contracting parties. The American Telegraph Company were engaged in carrying on the telegraph business in some portions of the country, and naturally desirous of appropriating to itself any new invention which would facilitate the transmission of telegraphic messages. Humaston

claimed that his system just patented would do five times as much business on one wire as the ordinary systems then in use. If it could do this with equal accuracy and reliability and at no greater cost, the value of it could be hardly overestimated; but there had been no experiments to test the question of whether or not it was capable of doing these things. It might do the work claimed for it, and yet be so unreliable, or the expense of working and using it so much greater than the expense of working and using the inventions then open to the public or used by the company, that its purchase would be dear at any price. The company, desirous of possessing everything new and useful in the line of their business, were willing to risk something in the acquisition of these inventions, but unwilling to pay the estimate of value which Humaston put upon them without trial of their utility. This estimate was $50,000, as the proof on the trial was that the stock of the company stood at par in the market at the date of the contract. The company said to Humaston, We will take your patents, whether valid or not, and pay you $5000 for them if you and Lefferts stipulate not to compete with us for a period of ten years; and if they are valid, whether useful or not, the compensation shall be increased to $10,000. But we cannot promise additional compensation unless, after proper experiment, your system shall be proved to be worth more. It may be that your claim of rapid performance can be sustained, and yet the system owing to its greater cost than those now in use, or some other controlling practical consideration, be of comparatively little value to us. This can only be determined after trial, by some impartial tribunal. We are willing that this tribunal shall be referees mutually selected, to whom shall be submitted the question of whether we shall pay anything more than the $10,000 already paid, after the merits of your system have been tested by them and its capability and value established. They may reach the conclusion that you are sufficiently compensated already, and if they do, their award must be accepted as a final settlement of the matters of difference between us. If they reach a contrary conclusion, they must fix the amount of consideration which we are to pay in addition to what you

have already received; but this must be within the limit of four hundred shares of stock, equivalent to $40,000.

This is a fair analysis of the provisions of the contract and of the considerations on which it was based. Instead of it binding the company to pay four hundred shares, unless a less number was fixed by the arbitrators, it left them to say whether Humaston was entitled to any more than he had already got, and, if so, how much? There was no concession by the company that the inventions were worth any more to it than the hundred shares. It might turn out on the trial that the price already paid was excessive, or, on the contrary, that it was not sufficiently remunerative. This point of value the triers were to determine, and if determined favorably to the plaintiff, he would have a cause of action against the defendant. Until this determination, if there had been no interruption to the arbitration, no cause of action could arise. It was a reasonable provision that the value of these inventions should be submitted to the arbitration of practical business men, and if Humaston, instead of the company, had refused to proceed with the arbitration, he could not resort to an action, for the defendant would not have been in default, and, therefore, not liable to suit: Delaware & Hudson Canal Co. *v.* The Pennsylvania Coal Co., 50 N. Y. 250. But the defendant broke the agreement and revoked the submission, and Humaston asks that in consequence of this wrongful action of the defendant his rights may be determined by the Court and jury, instead of by arbitration.

It becomes, therefore, important to determine what is the measure of liability for the breach of contract by the defendant. If we are correct in our interpretation of the contract, this action cannot be supported as an action seeking damages for breach of contract to deliver stock, for there was no engagement to deliver any, except on a condition which has not happened, and there is no proof that the arbitrators would have found that Humaston was entitled to receive more stock than he had already obtained.

The action can be supported for the value of the property, and this was the proper subject of inquiry at the trial. The company covenanted to pay this value, to be ascertained in a

particular mode, and as they have prevented this mode being adopted, they cannot take advantage of their own wrong and deprive the plaintiff of the opportunity of showing to the Court and jury what it is. In lieu of the award of the arbitrators the verdict of the jury can be asked by the plaintiff to determine it. The ascertainment of this value was the essence of the contract, the thing on which the submission was based, and the revocation of the submission leaves the jury to settle it. Benjamin, in his Treatise on Sales, says, if the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in Clarke *v.* Westrope, where the out-going tenant sold the straw on a farm to the incomer, at a valuation to be made by two indifferent persons, but, pending the valuation, the buyer consumed the straw. And the doctrine of the text is sustained by adjudged cases in this country and England.

Nothing is, therefore, due on this contract, unless the Court and jury, sitting in the place of the arbitrators, shall decide that the plaintiff is entitled to recover for the sale of his inventions more than he has already received. The case was tried on this theory, and the Court charged the jury that the value of a specified amount of stock was not the legal measure of the plaintiff's damages, but that he was entitled to recover the excess (if any there was) which the value of what he sold and transferred to the company, enhanced by the agreement of the plaintiff and Lefferts not to enter into competition with the company, as stipulated in the contract, had, when sold and delivered, over the amount which he had already received; and this the parties agreed was one hundred shares of the defendant's stock, of the aggregate value of $10,000, with interest on such excess from the date of the revocation of the powers of the arbiters. This charge is in conformity with the views we have expressed of the obligations of this contract, and of the rule of damages applicable to the breach of it.

It is urged, however, that the Court erred in excluding testimony of the value of the defendant's stock both when they sold out to the Western Union Company, and when the revocation occurred.

It is not perceived how the sale to the Western Union Company changed the rights of the parties, for there is nothing to show that it hindered the defendants from acquiring in the market at any time a sufficient number of shares of its stock to comply with the award which it was expected the arbitrators would be suffered to make long after this sale took place.

If there had been an agreement to deliver a certain quantity of stock, and an action had been brought for the conversion of it, on the ground that the defendant by the sale to another company had put it out of its power to comply with the terms of its agreement, evidence of the value of the stock at the time the sale occurred would be competent. And so would evidence of its value at the date of the revocation, if the plaintiff was in a position to support an action for damages for breach of contract to deliver stock. But as he is limited in his recovery to the value of his inventions when sold and delivered, evidence of the value of shares of stock at all is only proper as tending to show the estimate put upon the property by the parties at the time they made their bargain. And as the value of the stock in 1861, when the contract was concluded, was directly shown, its value at any other time became unimportant. The Circuit Court proceeded on the theory, and we think correctly, that the defendant intended to give for and considered the plaintiff's property worth (if it performed certain conditions) the cash equivalent of five hundred shares of stock. This was $50,000, which the plaintiff must also have adopted as his estimate of the value of the property when he sold it, as he offered evidence tending to show that it was worth that sum, and claimed that the evidence proved the fact. The conflict of testimony on the worth of the Humaston inventions was very great, for the defendant also introduced evidence tending to prove, and claimed it was proved, that these inventions were of no value, or, if any, no more than the amount already paid for them.

In this condition of the evidence it was a difficult matter for the jury to settle the issue submitted to them, but as they were able to do it with the aid of the Court and eminent counsel,

after a lengthy trial, by finding a considerable verdict for the plaintiff, it would seem that he ought to be satisfied with it.

At any rate there is no error in the record, and the judgment must be

Affirmed.

I.

Price implied.

TAFT *v.* TRAVIS.

Supreme Court of Massachusetts, 1883.

136 Mass. 95.

C. ALLEN, J. There was some evidence tending to show that the plaintiff, being the owner of the engine, met the defendant at a time when the latter had it in his possession either rightfully or wrongfully, and gave notice of his ownership, and that he, the plaintiff, did not wish the defendant to pay any one for it but himself; that the defendant did not dissent therefrom, and said he had paid a few dollars for setting it up, but would pay no more till he saw the plaintiff; that the engine accordingly remained in the possession of the defendant, with no offer on his part to give it up; and that nothing was thereafter done or said by him to modify the inferences which might be drawn from what had gone before. This, if believed by the jury to be the true state of the case, would warrant them in finding that both parties assented to treating the engine as then sold by the plaintiff to the defendant, for a reasonable price, not fixed. If the defendant did not wish to keep it on these terms, he might have said so. An assent to a sale need not be in express terms; and it is not necessary that a price be fixed by the parties. If no price is fixed, the law implies that it is what the article is reasonably worth: Acebal *v.* Levy, 10 Bing. 376; Hoadly *v.* M'Laine, 10 Bing. 482; Valpy *v.* Gibson, 4 C. B. 837; Benjamin on Sales (4th Am. ed. by Corbin), 52, 102, 270–272.

As to the amount of damages, the verdict may stand, upon the ground that the plaintiff repudiated what Huntoon had done,

and that the transaction between the plaintiff and the defendant alone constituted the sale.

Exceptions overruled.

DARLINGTON, P. P. 77; 1 Benjamin on Sales, § 102; Cunningham *v.* Ashbrook, 20 Mo. 553; Jenkins *v.* Richardson, 6 J. J. Marsh. 442; Esterlin *v.* Rylander, 59 Ga. 292; James *v.* Muir, 33 Mich. 223; McEwen *v.* Morey, 60 Ill. 32; Fenton *v.* Braden, 2 Cranch, C. C. 550; Acebal *v.* Levy, 10 Bing. 382; 25 Eng. Com. Law; Hoodley *v.* McLaine, 10 Bing. 487; 25 Eng. Com. Law.

Kountz v. Kirk (also Kirch), 18 A. R. 65).

J.

No sale without a fixed price.

WITTKOWSKY *v.* WASSON.

Supreme Court of North Carolina, 1874.

71 N. C. 451.

RODMAN, J. As the Judge instructed the jury to find a verdict for the defendant, he must be taken to have decided that there was *no* evidence of a sale of the goods to the plaintiff. Where there is *any* evidence to support a plaintiff's claim, it is the duty of the Judge to submit the question to a jury, who are the exclusive judges of its weight. This doctrine must have been a part of the law from the earliest times at which the respective functions of the Judge and jury were discriminated. The earliest distinct expression of it that I know of was by BULLER, J., in Company of Carpenters, etc., 1 Doug. 375. "Where there be any evidence is a question for the Judge. Whether sufficient evidence is for the jury."

Since then it has been repeated innumerable times. Of course, after a while it became a question as to what was the meaning of the phrase, "*any* evidence." Did it mean the slightest scintilla of evidence, or such only as that from which a jury might *reasonably* infer the existence of the alleged fact. The latter view has been adopted in this State and in England, and, so far as my researches have extended, in other States

generally. This was the view taken by this Court in State *v.* Vinson, 63 N. C. Rep. 335, upon the authorities there cited. In addition to those are the following cases in this State, which speak a uniform language: Jordan *v.* Lassiter, 6 Jones, 130; State *v.* Revels, Busb. 200; Sutton *v.* Madre, 2 Jones, 320; Cobb *v.* Fogleman, 1 Ired. 440.

There is a recent case in the English Court of Exchequer Chamber, which puts the doctrine so clearly as to excuse a quotation. The question in that case was whether certain articles which had been sold to an infant were necessaries. WILLES, J., says: "There is in every case a preliminary question which is one of law, viz.: whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a *scintilla*, in support of the case; but it is now settled that the question for the Judge (subject, of course, to review) is, as stated by MAULE, J., in Jewell *v.* Parr, 13 C. B. 916 (76 E. C. L. R.), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In Toomey *v.* London and Brighton R. W. Co., 3 C. B. N. S. 150 (91 E. C. L. R.), WILLIAMS, J., enunciates the same idea thus: 'It is not enough to say that there was some evidence—a *scintilla* of evidence clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence'—the fact in that case to be established. And in Wheelton *v.* Hardisty, 8 E. & B. 262 (92 E. C. L. R.), in the considered judgment of the majority of the Court, it is said: 'The question is, whether the proof was such that the jury would reasonably come to the conclusion that the issue was proved?' This, 'they say,' is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have, in our opinion, so properly put an end to what had been treated as the rule, that a

case must go to the jury if there were what had been termed a *scintilla* of evidence:" Ryder *v.* Wombwell, (1868) L. R. 4 Exch. 22. By thus quoting from recent English cases we do not mean to extend or alter any rule of practice or evidence heretofore recognized in this State. The great importance of this understanding of the phrase, "any evidence," will be seen by considering it as it may be applied in criminal actions.

The question then is, was there any evidence in this case of a sale of the goods in question to the plaintiffs. A sale is defined by Benjamin as "a transfer of the absolute or general property in a thing for a price in money. To the completion of this contract, as of all others, there must be the mutual assent of the parties to its terms. Such mutual assent cannot exist unless the terms are definite. The thing sold must be ascertained. Until the specific thing is agreed on, the agreement can only be executory:" Benjamin on Sales, 227-28.

And for a like reason, the price to be paid must also be certain, or some guide must be agreed on by which it can be found with certainty. There may be a sale for a reasonable price, in which case, if the party afterwards differ, the price must be made certain by the verdict of a jury. Or there may be a sale at a price to be afterwards fixed by valuers. In such case, if the valuers refuse to fix the price, the sale is considered incomplete or else as rescinded by the refusal. If, indeed, the thing sold has been delivered to the vendee and consumed, so that the parties cannot be put *in statu quo*, the vendee is liable for a reasonable price: Benjamin on Sales, 69; Clarke *v.* Westroppe, 18 C. B. 765. But there cannot be an executed sale so as to pass the property where the price is to be fixed by agreement between the parties afterwards, and the parties do not afterwards agree. One element of a sale is wanting, just as a different element would be if the thing were not ascertained. If in such case the thing was actually delivered and consumed, the vendee would be liable, not upon the special imperfect contract, but on an implied contract to pay a reasonable price. In Devane *v.* Fennell, 2 Ired. 36, it is said that if upon a contract for the sale of goods anything remains to be done by the vendor to ascertain the price, etc., the sale is incomplete, and if the

actual possession has been delivered to the vendee, it is still constructively in the vendor.

To apply these principles to the evidence for the plaintiff in the present case: The plaintiffs being creditors of Wycoff & Shepperd, sued out an attachment against them, and sent a deputy sheriff and another person as their agent, to the store of Wycoff & Shepperd. The attachment was not levied and no claim is set up on that account. The agent proposed to take the goods in question, or as much of them as might be required for the purpose, in payment of the plaintiffs' debt, but he and Shepperd did not agree upon the price. Thereupon, as the case states the testimony of the agent, who was a witness for plaintiffs, "the agent and Shepperd agreed to box up all the goods without an inventory, haul them to Troutman's depot on the A., T. & O. R. R. next morning, which was Thursday; that on the next Monday Shepperd was to go down with the goods to Charlotte, and agree on the price with Wittowsky, and if they agreed, the debt to plaintiffs was first to be paid out of the price, and the remainder paid over to Shepperd," etc.

The goods were accordingly hauled to the depot, and the agent of the railroad company was told that they were to go to plaintiffs at Charlotte, and that Shepperd was to go with them. The plaintiffs' agent, with the consent of Shepperd, sold some guano and a set of counter scales which were at the store, and before the goods were carried to the depot, and received the price. The goods were not sent to Charlotte, but remained at the depot; no price was afterwards agreed on between plaintiffs and Shepperd, and on Monday night they were levied on by the defendant as sheriff.

In all the transaction we think there is no evidence of an executed sale; nothing from which it could be reasonably or fairly inferred that it was the intent of the parties to it to transfer the absolute property in the goods to the plaintiffs.

There may be a doubt as to who had actual possession and control of the goods while at the depot, whether the plaintiffs or Shepperd. That question is not assumed either way, and no stress is put on it. But if the goods had happened to have been burned at the depot, and Wycoff & Shepperd had sued

the plaintiffs for the price as on an executed sale, by what rule would the price have been ascertained? Not by any furnished by the contract between the parties, which shows that the contract was incomplete.

Judgment affirmed.

1 Benjamin on Sales, § 85;
2 Sch. on Per. Property, §§ 213, 215;
Fuller *v.* Bean, 34 N. H. 290;
Brown *v.* Bellows, 4 Pick. 179;
Devane *v.* Fennell, 2 Ired. Law, 36;
Ames *v.* Quimby, 96 U. S. 324;
Vickers *v.* Vickers, L. R., 4 Equity Cases, 529.

Sale discussed, see—
Eldridge *v.* Kuehl, 27 Iowa, 173;
Williamson *v.* Berry, 8 How. 544.

Sale as used in indictments, see—
Stevenson *v.* The State, 65 Ind. 409;
Massey *v.* State, 74 Ind. 368;
Porter *et al. v.* Talcott *et al.*, 1 Cowen, 359;
Herrick *v.* Carter, 56 Barb. 41.

Inadequacy of price—
Erwin *v.* Parham, 12 Howard, 197;
Howard *v.* Edgell, 17 Vt. 9;
Lee *v.* Kirby, 104 Mass. 428.

109 N. Dak., 258

III.

CLASSES OF CONTRACTS RESPECTING SALES.

A.

Executed.

ELLIOTT *et al. v.* STODDARD.

Supreme Judicial Court of Massachusetts, 1867.

98 Mass. 145.

CHAPMAN, J. Both parties claim title to the machinery in controversy under Enoch Wait. On the 10th of October, 1864, he made a bill of sale of it to the plaintiffs and gave them possession. It was then in a factory which belonged to Willard Hayden & Co., and the plaintiffs did not remove it till the following December.

The defendant is a deputy sheriff, and subsequently attached the machinery as the property of Wait on a writ in favor of Hayden & Co. against him. His answer avers this fact; denies the plaintiffs' title, and says the sale to them was colorable and was made to defraud the creditors of Wait; also that Wait was under a contract to sell and convey the whole or a part of the machinery to Hayden & Co., and that the sale to the plaintiffs was intended to prevent the fulfilment of this contract, and was fraudulent as to Hayden & Co.

The ruling of the Superior Court, that the burden was not on the plaintiffs to prove that the sale to them was not made to hinder, delay, or defraud Wait's creditors, was in conformity with an elementary rule of evidence too well settled to be called in question. No authority is cited to sustain the defendant's exception to the ruling. The instructions given to the jury as to the evidence on that point were sufficiently favorable to the defendant.

The evidence offered to prove a contract between Wait and

Hayden & Co. on August 25, 1864, for the sale of the machinery, was properly excluded, for it was not stated that Hayden & Co. had actually purchased and paid for the machinery, nor was it contended at the argument that the offer was to be so construed. The contract was therefore executory, and no legal title to the machinery passed by virtue of it to Hayden & Co. As against such a contract the legal title would pass to the plaintiffs by the sale and delivery to them; and the contract, and the election of Hayden & Co. on the 22d of November to purchase the property in compliance with its terms, and the notice of their election to Wait, and any subsequent arrangement with him short of a sale and delivery, would not authorize them to contest the title of the plaintiffs in this action.

The ruling was also correct that the plaintiffs, in proving the sale of Wait to them, might offer in evidence such declarations of the parties as accompanied the acts, and formed part of the *res gestæ*. What particular declarations were offered does not appear. No question is made except as to the general principle, and it is too well established to admit of doubt.

Exceptions overruled.

B.

Executory.

Bradshaw *v.* Warner *et al.*

Supreme Court of Indiana, 1876.

54 Ind. 58.

Worden, C. J. This was an action of replevin by the appellees against the appellant, for a safe. Trial by Court, special finding of facts, conclusions of law thereon stated, and judgment for plaintiffs.

The defendant appeals, assigning the single error that the Court erred in the conclusions of law.

The following are the facts found by the Court, viz.:—

"In the spring of 1873, an agent of the plaintiffs called on A. G. Wolf & Co., merchants, at their place of business in

Delphi, Indiana. The result of that call was an order to the plaintiffs for a safe. This order is in writing, and is in the foling words and figures, viz.:—

"'DELPHI, INDIANA, May 15, 1873.

"'Messrs. Warner & Carey: Please send us, as soon as convenient, one Diebold & Kienzle's, No. 6, fire S. D. proof safe; size as per illustrated catalogue; ship via Cincinnati, freight, to Delphi, Indiana, from Canton, Ohio. Terms, on board cars in Canton, Ohio, with note, one hundred and sixty-five dollars, one-fourth in four, one-fourth in eight, one-fourth in twelve, one-fourth in sixteen months from date of invoice, without interest.

"'Remarks: Name on outside of safe, "A. G. W.;" on inside, "Drawer."

"If note is not forwarded to you at the expiration of twenty-five days from date of invoice, the account shall become due at the expiration of thirty days from date of bill, and agree to accept and pay draft of amount mentioned below, and are not to countermand this order. It is agreed that the title to said safe not pass until notes are paid, or safe paid for in cash, but shall remain your property until that time. Net price, one hundred and sixty-five dollars.

"'Yours, truly,

"'A. G. WOLF & Co.'

"This order or letter was signed, executed, and delivered to the plaintiffs' agent by said A. G. Wolf & Co., and by him forwarded, in due course of mail, to the plaintiffs in Chicago, Illinois, where it was received on the 17th day of May, 1873.

"Some time in the summer of 1873 the plaintiffs duly executed their part of said contract, and the safe ordered was received and accepted by said A. G. Wolf & Co., at Delphi, Indiana.

"That before the shipment of the safe, the plaintiffs made inquiries about the financial standing of A. G. Wolf & Co.

"After the reception of the safe by A. G. Wolf & Co., they placed the same in, and used the same at, their place of business in Delphi, Indiana, until May, 1874.

"That said A. G. Wolf & Co. accepted four drafts, drawn on

them by the plaintiffs, for forty-one dollars and twenty-five cents each, payable in four, eight, twelve, and sixteen months, respectively, all bearing date July 31, 1873. That neither of said drafts was ever paid. That said A. G. Wolf & Co. never paid plaintiffs in any way for said safe.

"That at the time the first acceptance became due, the said A. G. Wolf & Co. were insolvent, and have so remained ever since.

"That on May 15, 1874, a constable of Deer Creek Township, Carroll County, Indiana, levied an execution, then in his hands, against said A. G. Wolf & Co., and in favor of creditors other than the plaintiffs, upon said safe, to satisfy said execution.

"That at and before the time of the levy, the said safe being in the possession of A. G. Wolf & Co., A. G. Wolf told the said constable that said safe was his [their] absolute property.

"That the safe was advertised by the said constable for sale to satisfy said execution, and at the sale the defendant, Bradshaw, believing the safe to belong to said A. G. Wolf & Co., and being ignorant of the plaintiffs' claim, bid upon said safe, and it was struck off to him by the constable, at and for the price of eighty dollars, which sum he then and there paid to the constable and took possession of said safe.

"That before the commencement of this suit, plaintiffs demanded of defendant a return of the safe, which defendant refused and still refuses to do. That said safe was of the value of eighty dollars at the time of the demand."

The Court concluded, as matter of law arising upon the facts, that the plaintiffs were entitled to recover the safe, and rendered judgment accordingly.

The main ground assumed by the appellant is, that as he was a purchaser without any notice of the appellees' claim to the safe, and that as A. G. Wolf & Co. had the indicia of ownership, his rights should be held paramount to those of the plaintiffs.

But the title to the property never passed to A. G. Wolf & Co. at all. By the express terms of the contract, the title to the safe was not to pass to Wolf & Co. until it was paid for,

but, on the contrary, it was to remain in the plaintiffs until that was done.

As the title was not in Wolf & Co. at the time of the constable's sale, no title was acquired by the appellant by his purchase, unless there is something in the case that takes it out of the ordinary rule that the purchaser of personal property acquires no better right to it than his vendor had. We see nothing in the case that takes it out of the ordinary rule. As a general rule, the purchaser of personal property on execution acquires no better right than the execution-defendant had. The appellant evidently acquired no better title than if he had in good faith purchased the safe from Wolf & Co. The statement of Wolf to the constable, that the safe was theirs, cannot affect the plaintiffs' right to it. On principle and authority, we think the plaintiffs were entitled to the safe, and, therefore, that the Court did not err in its conclusions.

In the case of King *v.* Wilkins, 11 Ind. 347, it was said, in speaking of a conditional sale like the present, "Against creditors whose demands originated while the property was in possession of the vendee, so that it might be fairly presumed that a false credit was given him, the vendor cannot, in our opinion, set up title."

We doubt the correctness of the statement, as applied to a case where the title has never passed from the supposed vendor. But if it were a correct statement of the law, it would have no application to the case here, for here it was not found that the debt on which the judgment was rendered, and for which the safe was sold by the constable, was contracted while the safe was in the possession of Wolf & Co.

A later case in this Court, that of Thomas *v.* Winters, 12 Ind. 322, is in point here. There, Thomas & Co. sold two steers to Johnson, to be paid for in staves, and a written agreement, signed by Johnson, contained this provision: "And the said Thomases hold the said steers as their property until the delivery of said staves."

Johnson took possession of the steers and sold them, never delivering the staves. In an action of replevin by the Thomases, against the purchaser, for the steers, it was held that the title had not passed from Thomas & Co., and, therefore, that the pur-

chaser from Johnson acquired no title. The case of Dunbar *v.* Rawles, 28 Ind. 225, is also in point.

We content ourselves with citing two authorities from other States. In Ballard *v.* Burgett, 40 N. Y. 314, the plaintiff sold oxen to one France for one hundred and eighty dollars, with the agreement that the oxen were to remain the property of the plaintiff until paid for. France, never having paid for the oxen, sold and delivered them to the defendant, who had no notice of the plaintiff's claim. It was held, upon an extensive examination of the authorities, that the title to the property had not passed from the plaintiffs; that the purchaser from France acquired no title; and that the plaintiff was entitled to recover the oxen.

The case of Hirschorn *v.* Canney, 98 Mass. 149, was replevin for seventy thousand cigars. The plaintiffs, of New York, sold the cigars to one Eaton, of Boston, "on the condition that if his references should be satisfactory, they would ship the cigars to him, and he should send his notes in payment." The references being satisfactory, the plaintiffs shipped him the cigars, and sent him by mail a bill of lading, and a letter as follows, viz.: —

"We have the pleasure to inclose bill of lading of ten cases cigars. Please remit us your notes for the amount of bill."

Eaton received the cigars, and, soon afterwards, sold them in the usual course of business to the defendants, but he never sent his notes to the plaintiffs in payment. It was held that the plaintiffs were entitled to recover the cigars; that the sale to Eaton was on condition that he should send them his notes in payment; and that, as he had not performed the condition, the title did not vest in him, and the defendants acquired no title by their purchase from Eaton.

The judgment below is affirmed, with costs.

C.

Conditional.

MINNEAPOLIS HARVESTER WORKS *v.* HALLY.

Supreme Court of Minnesota, 1881.

27 Minn. 495.

BERRY, J. This action is brought upon the following instrument:—

"$240. BELLE PLAINE, MINN., October 5, 1878.

"On or before the first day of September, 1879, for value received in two M. L. reapers, I promise to pay to the order of the Minneapolis Harvester Works, two hundred and forty dollars, at the office of Minneapolis Harvester Works, in Minneapolis, Minn., with interest at the rate of 12 per cent. per annum from date until paid; agreed, that if paid at maturity (or in thirty days thereafter), then the interest shall be nothing. And I further agree, in consideration of the credit herein given, that if this note is not paid when due, and suit is brought thereon, I will pay five dollars additional on the amount then due for attorney's fees, and the same may be included in the judgment. And I further agree to pay all other reasonable expenses incurred in collecting this note.

"The express condition of the sale and purchase of the machine for which this note is given is such that the title, ownership, or right of possession does not pass from the said Minneapolis Harvester Works, until this note and interest is paid in full. And the said Minneapolis Harvester Works, or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, even before the maturity thereof; and may take possession of said machine, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses; also this note to become due upon the removal of its maker from the county wherein he now resides. This note may be paid in good farmers' notes, taken and indorsed according to contract.

"M. HALLY.

"*P. O., Belle Plaine, County of Scott, State of Minn.*

"Witness: P. B. NETTLETON."

The expressed consideration of the instrument is "value received in two M. L. reapers." It is expressly conditioned in the same "that the title, ownership, or right of possession" of the machines "does not pass from the said Minneapolis Harvester Works until this note and interest is paid in full." It appears from undisputed evidence on both sides that the machines have been taken from the possession of the defendant by the plaintiff, and sold. This fact we understand to be also substantially alleged in the complaint. The result is that there is a total failure of the consideration expressed in the instrument. The case is one of a conditional sale; that is to say, of a transaction which was to take effect as a sale, so as to pass the title of the reapers, and the right of possession upon payment therefor, and not otherwise. The defendant not only never acquired any "title, ownership, or right of possession of the machines," but he has by the act of the plaintiff been deprived of the power of acquiring any by paying the price specified in the instrument.

The case is similar to Third Nat. Bank *v.* Armstrong, 25 Minn. 530, where it is said that "the promise of payment and the implied obligation to transfer the title were mutual, and as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform the one would excuse performance as to the other." Whatever remedy, therefore, the plaintiff may have in the premises, this action, which is brought upon the instrument mentioned to recover the price therein agreed to be paid by the defendant for the machines, cannot be maintained.

The verdict was therefore right, and the order denying a new trial is accordingly affirmed.

Farquahar *v.* McAlevy, 142 Pa. St. 233; 24 A. S. R. 497

Gross *v.* Jorden, 83 Me. 384; 22 Atl. 250;

Shoshonetz *v.* Campbell, 24 Pac. 672; 7 Utah, 46;

Hays *v.* Jordan, 85 Ga. 741 (11 S. E. 833).

IV.

EFFECTS.

I.

TRANSFER OF TITLE.

a.

Test.

In determining when the *title* to the chattel passes from the seller to the buyer, the *intention* of the parties to the contract of sale is the controlling *test*, and this *intention* is to be ascertained from the language of the parties, the subject-matter, and the various facts and circumstances attending the transaction.

HATCH *v.* OIL CO.

Supreme Court of the United States.

100 U. S. 124.

Mr. Justice CLIFFORD delivered the opinion of the Court.

Contracts for the purchase and sale of chattels, if complete and unconditional and not within the Statute of Frauds, are sufficient, as between the parties, to vest the property in the purchaser, even without delivery; the rule being that such a contract constitutes a sale of the thing, and that its effect is, if not prejudicial to creditors, to transfer the property to the purchaser against every person not holding the same under a *bona fide* title for a valuable consideration without notice: The Sarah Ann, 2 Sumn. 211; Gibson *v.* Stevens, 8 How. 384, 399; 2 Kent, Com. (12th ed.) 493; Leonard *v.* Davis, 1 Black, 476–483.

Nine hundred and forty-four thousand white-oak barrel-staves, of the value of $17,500, were attached by the defendant

as sheriff of the county, under certain processes mesne and final, which he held for service against the manufacturers of the staves, to secure certain debts which they owed to their creditors. No irregularity in the proceedings is suggested, but the plaintiffs claimed to be the owners of the staves by purchase from the manufacturers, and they brought replevin to recover the property. Service was made, and the defendant appeared and demanded a trial of the matters set forth in the declaration. Issue having been joined between the parties, they went to trial, and the verdict and judgment were in favor of the plaintiffs. Exceptions were filed by the defendant, and he sued out the present writ of error.

Errors assigned in the Court are as follows: 1. That the Court erred in instructing the jury that as soon as the staves were piled and counted, as provided in the second agreement, the title to the same vested in the plaintiff company as vendee, and in refusing to instruct the jury that the only interest the plaintiffs acquired in the staves before they were delivered was as security for advances in the nature of a mortgage interest. 2. That the Court erred in refusing to instruct the jury that, if there was no actual delivery of the property and change of possession, the agreement of sale was void as against the creditors of the manufacturers, because not recorded as required by statute. 3. That the Court erred in refusing to instruct the jury that if the evidence did not show that the fifty thousand staves not piled on the leased land were not counted, the title to that parcel did not pass to the plaintiffs for any purpose, and that the defendant, as to that parcel, was entitled to their verdict. 4. That the Court erred in refusing to instruct the jury that under the agreement no title to any of the staves passed to the plaintiffs until they were actually placed upon the leased land and were counted by the designated person, and in instructing the jury that the title to the staves piled near the leased land passed to the plaintiffs. 5. That the Court erred in refusing to instruct the jury that no title to any staves passed to the plaintiffs other than those contracted to be sold by the first agreement, and that if the jury find that there was any portion of the staves replevied not of that description, that as to such portion the plaintiffs are not entitled to recover. 6.

That the Court erred in excluding the testimony offered by the defendant, as set forth in the record.

Sufficient appears to show that the manufacturers of the staves, on the day alleged, contracted with the plaintiffs to sell them one million of white-oak barrel-staves of certain described dimensions, to be delivered as therein provided, for the price of $30 per thousand, subject to count and inspection by the plaintiffs, who agreed to receive and pay for the same as fast as inspected. But before the staves had been furnished, to wit, on the 28th of August in the same year, the parties entered into a new agreement in regard to the staves, in which they refer to the prior one, and stipulate that it is to continue in operation, subject to modifications made in the new contract, of which the following are very material to the present investigation: 1. That the manufacturers shall make and deliver the staves properly piled in some convenient place, to be agreed between the parties, on land in Deerfield, to be controlled by the plaintiffs, and that the delivery shall be made as fast as the staves are sawed. 2. That the plaintiff shall furnish a man to count the staves from week to week as the same shall be piled. 3. That when the staves shall be so piled and counted, the person counting the same shall give the manufacturers a certificate of the amount, which, when presented to the plaintiffs, shall entitle the party to a payment of $17 per thousand as part of the purchase price. 4. That upon the piling and counting of the staves as provided, "the delivery of the same shall be deemed complete, and that said staves shall then become and thenceforth be the property of the plaintiffs absolutely and unconditionally.

Other material modifications of the first agreement were made by the second, some of which it is not deemed necessary to consider in disposing of the case.

Early measures were adopted to perfect the arrangements, as appears from the fact that the manufacturers, October 4th in the same year, leased to the plaintiffs a small tract of land to be used for piling and storing the staves; and the case shows that all the staves except fifty thousand were piled on that site, the fifty thousand staves being piled on land owned by the manufacturers, about one hundred or one hundred and fifty feet dis-

tant from the pile on the leased tract, on which were certain buildings owned and occupied by the lessors, the mill where the staves were manufactured being situated on the same section a little distant from the other buildings. None of the staves were manufactured when the contracts were made.

It was admitted by the plaintiffs that the lease was never filed in the clerk's office, and that it was never recorded in the office of the county register of deeds. Certain admissions were also made by the defendant, as follows: That the parties to the contracts acted in good faith in making the same, and that the contracts and lease were duly executed; that all the staves seized were manufactured by the said contractors, and that all except fifty thousand of the same were piled on the leased tract.

Nothing was required at common law to give validity to a sale of personal property except the mutual assent of the parties to the contract. As soon as it was shown by competent evidence that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as completely proven and binding on both parties. If the property by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. Ambiguity or incompleteness of language in the one or the other frequently leads to litigation; but it is ordinarily correct to say that whenever a controversy arises in such a case as to the true character of the agreement, the question is rather one of intention than of strict law, the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances.

Where the specific goods to which the contract is to attach

are not specified, the ordinary conclusion is that the parties only contemplated an executory agreement. Reported cases illustrate and confirm that proposition, and many show that where the goods to be transferred are clearly specified and the terms of sale, including the price, are explicitly given, the property, as between the parties, passes to the buyer even without actual payment or delivery: 2 Kent, Com. (12th ed.) 492; Tome *v.* Dubois, 6 Wall. 548, 554; Carpenter *v.* Hale, 8 Gray (Mass.), 157; Martineau *v.* Kitching, Law Rep. 7 Q. B. 436, 449; Story, Sales (4th ed.), sect. 300.

Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject cannot be entertained if the terms of bargain and sale, including the price, are explicit; but when the thing to be sold is not specified, or if when specified something remains to be done to the same by the vendor, either to put it into a deliverable state or to ascertain the price, the contract is only executory. In the former case there is no reason for imputing to the parties any intention to suspend the transfer, inasmuch as the thing to be sold and the price have been specified and agreed by mutual consent, and nothing remains to be done. Quite unlike that, something material remains to be done by the seller in the latter case before delivery, from which it may be presumed that the parties intended to make the transfer dependent upon the performance of the things yet to be done.

Suppose that is so, still every presumption of the kind must yield to proof of a contrary intent, and it may safely be affirmed that the parties may effectually agree that the property in the specific thing sold, if ready for delivery, shall pass to the buyer before such requirements are fulfilled, even though the thing remains in the possession of the seller.

Where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, BAILEY, J., said the property passes immediately, so as to cast upon the purchaser

all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price: Simmons *v.* Swift, 5 B. & C. 857; 11 Eng. Com. Law.

Sales of goods not specified stand upon a different footing, the general rule being that no property in such goods passes until delivery, because until then the very goods sold are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the same and to pay the stipulated price, the parties, says PARKE, J., are thus in the same situation as they would be after a delivery of goods under a general contract, for the reason that the very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to accepting possession: Dixon *v.* Yates, 5 Barn. & Adol. 313, 340; 27 Eng. Com. Law; Shep. Touch. 224.

When the agreement for sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to ascertain the price to be paid by the buyer, the contract is merely an executory agreement, unless it contains words warranting a different construction, or there be something in the subject-matter or the circumstances to indicate a different intention: Benjamin, Sales (2d ed.), 257; Blackburn, Sales, 151; Young *v.* Matthews, Law Rep. 2 C. P. 127–129; Logan *v.* Le-Mesurier, 6 Moore P. C. C. 116; Ogg *v.* Shuter, Law Rep. 10 C. P. 159–162; Langton *v.* Higgins, 4 H. & N. 400; Turley *v.* Bates, 2 H. & C. 200–208.

Exactly the same views are expressed by the Supreme Court of the State as those maintained in the preceding cases. Speaking to the same point, COOLEY, C. J., says, when, under a contract for the purchase of personal property, something remains to be done to identify the property or to put it in a condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong that by the understanding of the parties the title is not to pass until such act has been fully accomplished. Such a presumption, however, is by

no means conclusive; for if one bargains with another for the purchase of such property, and the parties agree that what they do in respect to its transfer shall have the effect to vest the title in the buyer, he will become the owner, as the question is merely one of mutual assent, the rule being, that if the minds of the parties have met, and they have agreed that the title shall pass, nothing further, as between themselves, is required, unless the case is one within the Statute of Frauds. Consequently, it was held by the same Court that if one purchases gold bullion by weight, and receives delivery before it becomes convenient to weigh it, and on the understanding that the weighing shall be done afterwards, the bullion would become the property of the buyer and be at his risk, unless there were some qualifying circumstances in the case: Wilkinson *v.* Holiday, 33 Mich. 386–388; Lingham *v.* Eggleston, 27 Id. 324, 328; Ortman *v.* Green, 26 Id. 209, 212.

Decisions of other States are to the same effect, of which the following are examples: Pacific Iron Works *v.* Long Island Railroad Co., 62 N. Y. 272, 274; Groff *v.* Belche, 62 Mo. 400–402; Morse *v.* Sherman, 106 Mass. 430, 433; Riddle *v.* Varnum, 20 Pick. (Mass.) 280, 283; Chapman *v.* Shepard, 39 Conn. 413–419; Fuller *v.* Bean, 34 N. H. 290–300.

Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer, and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties: Gilmore *v.* Supple, 11 Moore P. C. C. 551; Benjamin, Sales (2d ed.), 286; Dunlop *v.* Lambert, 6 Cl. & Fin. 600; Calcutta Co. *v.* DeMattos, 32 Law J. Rep. N. S. Q. B. 322–338.

"There is no rule of law," says BLACKBURN, J., in the case last cited, "to prevent the parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual:" S. C., 33 Id. 214; 11 W. R. 1024, 1027.

Support in some of the cases cited is found to the theory that the terms of the bargain and sale in this case, inasmuch as they indicate that the intention of the sellers was to appropriate the staves when manufactured to the contract, are sufficient to vest the property in the buyer when the agreed sum to be advanced was paid even without any delivery; but it is quite unnecessary to decide that question in view of the evidence and what follows in the second contract between the parties.

Provision was made that a convenient place should be designated by the parties where the staves should be piled as fast as they could be sawed. Such a place was provided to the acceptance of both parties, and the plaintiffs furnished a man as agreed to count the same from week to week as the staves were piled. Enough appears to show that all the staves, except as aforesaid, were piled and delivered at that agreed place.

In a contract of sale, if no place of delivery is specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale, unless some other place is required by the nature of the article or by the usage of the trade or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case. Decided cases to that effect are numerous; but the rule is universal, that if a place of delivery is prescribed as a part of the contract, the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor obliged to make a tender elsewhere: Story, Sales (4th ed.), sect. 308.

Where, by the terms of the contract, the article is to be delivered at a particular place, the seller, before he can recover his pay, is bound to prove the delivery at that place: Savage Manuf. Co. *v.* Armstrong, 19 Me. 147.

So when the intention of the parties as to the place of delivery can be collected from the contract, and the circumstances proved in relation to it, the delivery should be made at such place, even though some alterations have been made in the place designated: Howard *v.* Miner, 20 Id. 325–330.

Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute

delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous, and decisive: Hyde *v.* Lathrop, 3 Keyes (N. Y.), 597; Macomber *v.* Parker, 13 Pick. (Mass.) 175, 183.

In an action for goods sold and delivered, if the plaintiff proves delivery at the place agreed and that there remained nothing further for him to do, he need not show an acceptance by the defendant: Nichols *v.* Morse, 100 Mass. 523.

Even when a place of delivery is specified, it does not necessarily follow that the title does not pass before they reach the designated place, as that may depend upon the intention of the parties; and whether they did or did not intend that the title should vest before that is a question for the jury, to be determined by the words, acts, and conduct of the parties and all the circumstances: Dyer *v.* Libbey, 61 Me. 45.

Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract: Burrows *v.* Whitaker, 71 N. Y. 291–296; Graft *v.* Fitch, 58 Ill. 373; Russell *v.* Carrington, 42 N. Y. 118, 125; Terry *v.* Wheeler, 25 Id. 520, 525.

Beyond controversy, such must be the rule in this case, because the contract provides that upon the piling and counting the staves as required by the instrument the delivery o the same shall be deemed complete, and that the staves shall then become and henceforth be the property of the plaintiffs absolutely and unconditionally.

Except the fifty thousand before named, all the staves were so piled and counted; and the case shows that the person designated to count the same approved fourteen certificates specifying the respective amounts of the several parcels delivered, and that the plaintiffs paid on each the $17 per thousand advance as agreed, amounting in all to $15,148.

Personal property may be purchased in an unfinished condition, and the buyer may acquire the title to the same though the possession be retained by the vendor in order that he may fit it for delivery, if the intention of the parties to that effect is fully proved: Elgee Cotton Cases, 22 Wall. 180.

After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied: Benjamin, Sales (2d ed.), 263; Rohde *v.* Thwaites, 6 B. & C. 388; 13 Eng. Com. Law.

Examples of the kind are numerous in cases where the goods are not specified, and the decided cases show that if the seller subsequently selects the goods and the buyer adopts his acts, the contract which before was a mere agreement is converted into an actual sale and the property passes to the buyer. One hundred quarters of barley out of a bulk in a granary were agreed to be purchased by the plaintiff, he having agreed to send his own sacks, in which the same might be conveyed to an agreed place. He sent sacks enough to contain a certain part of the barley, which the seller filled, but, being on the eve of bankruptcy, he refused to deliver any part of the quantity sold, and emptied the barley in the sacks back into the bulk in the granary. Held, in an action brought to recover the whole amount, that the quantity placed in the sacks passed to the purchaser, as that part was appropriated by the bankrupt to the plaintiff: Aldrich *v.* Johnson, 7 E. & B. 885; 90 Eng. Com. Law; Brown *v.* Hare, 3 H. & N. 484; s. c., 4 Id. 821; Tregeles *v.* Sewell, 7 Id. 573.

Stipulations in respect to the forwarding and shipping the staves are also contained in the second agreement; but it is not necessary to enter into any discussion of that topic, as it appears that the manufacturers, if they did any thing in that regard, were to act as the agents of the plaintiffs, and if they failed to transport the same to the place of shipment seasonably, the plaintiffs were authorized to do it at their expense. Nor is it necessary to discuss the stipulations as to insurance, as it is clear that they contain nothing inconsistent with the theory that the property vested in the plaintiffs as soon as the staves were piled and delivered at the agreed place of delivery.

Proof of a satisfactory character was exhibited that much the greater portion of the staves were piled upon the leased site, and that the residue were piled on land adjoining, and within a

hundred or a hundred and fifty feet from the larger pile. Witnesses examined the staves piled there several times, and one of them testified that he was there July 10, 1875, with one of the sellers, and made a thorough count of the staves, the number counted being 780,000, and he states that he counted the staves in both piles, and that there were no other white-oak staves on the premises.

Taken as a whole, the evidence shows that the parties treated both piles of the staves as delivered under the contract, the one as much as the other, and that they regarded both as properly included in the adjustment of the amounts to be advanced. When the agent of the plaintiffs went there, as before explained, with one of the sellers, it is certain that they counted both piles, and it is clear that in view of the evidence and the circumstances the jury were warranted in finding that the property in all the white-oak staves piled there passed to the plaintiffs when they were piled and delivered at that place, neither party having objected to the place where the smaller parcel was piled.

Actual delivery of the staves having been proved, it is not necessary to make any reply to the defence set up under the State statute in respect to the sale of goods unaccompanied by a change of possession. Objection is also made that the lease of the premises designated as the place of delivery was not recorded, which is so obviously without merit that it requires no consideration.

Viewed in the light of these suggestions, it is obvious that the first five assignments of error must be overruled.

Exception was also taken to the ruling of the Court below in excluding certain testimony offered by the defendant to show that the staves were not cut and made at the time some of the certificates were given to secure the advance, and to show that the staves included in the small pile were never in fact counted, and that no certificate specially applicable to them was ever given. Responsive to the objection of the defendant, the Court below remarked that, if the staves were subsequently piled there to the satisfaction of the plaintiffs, the title passed, it appearing that the certificates were given and the advance

paid, which is all that need be said upon the subject, as it is plain that the ruling is without just exception.

Judgment affirmed.

DARLINGTON, P. P., 77–81.
Hutchinson *v.* Hunter, 7 Pa. St. 140;
Groat *et al.* *v.* Gile, 51 N. Y. 430;
Morrow *v.* Reed *et al.*, 30 Wis. 81;
Graff *v.* Fitch, 58 Ill. 373;
Mason *v.* Thompson, 18 Pick. 305.

b.

Tests Applied.

1.

EXECUTED SALE.

Chattel specified, Non-payment, Non-delivery.

PHILLIPS, BY HIS GUARDIAN, *v.* MOOR.

Supreme Judicial Court of Maine, 1880.

71 Maine, 78.

BARROWS, J. Negotiations by letter, looking to the purchase by the defendant of a quantity of hay in the plaintiff's barn, had resulted in the pressing of the hay by the defendant's men, to be paid for at a certain rate if the terms of sale could not be agreed on; and in written invitations from plaintiff's guardian to defendant to make an offer for the hay, in one of which he says: "If the price is satisfactory, I will write you on receipt of it;" and in the other: "If your offer is satisfactory, I shall accept it; if not, I will send you the money for pressing." Friday, June 14th, defendant made an examination of the hay after it had been pressed, and wrote to plaintiff's guardian the same day . . . . "Will give $9.50 per ton, for all but three tons, and for that I will give $5." Plaintiff's guardian lived in Carmel, 14 miles from Bangor, where defendant lived, and there is a daily mail communication each way between the two places. The card containing defendant's

offer was mailed at Bangor, June 15th, and probably received by plaintiff, in regular course, about nine o'clock A. M. that day. The plaintiff does not deny this, though he says he does not always go to the office, and the mail is sometimes carried by. Receiving no better offer, and being offered less by another dealer, on Thursday, June 20th, he went to Bangor, and there, not meeting the defendant, sent him through the post-office a card, in which he says he was in hopes defendant would have paid him $10 for the best quality: "But you can take the hay at your offer, and when you get it hauled in, if you can pay the $10 I would like to have you do it, if the hay proves good enough for the price." Defendant received this card that night or the next morning, made no reply, and Sunday morning the hay was burnt in the barn. Shortly after, when the parties met, the plaintiff claimed the price of the hay, and defendant denied his liability and asserted a claim for the pressing. Hence this suit.

The guardian's acceptance of the defendant's offer was absolute and unconditional. It is not in any legal sense qualified by the expression of his hopes as to what the defendant would have done, or what he would like to have him do, if the hay when hauled proved good enough. Aside from all this, the defendant was told that he could take the hay at his own offer. It seems to have been the intention and understanding of both the parties that the property should pass. The defendant does not deny what the guardian testifies he told him at their conference after the hay was burned,—that he had agreed with a man to haul the hay for sixty cents a ton. The guardian does not seem to have claimed any lien for the price, or to have expected payment until the hay should have been hauled by the defendant. But the defendant insists that the guardian's acceptance of his offer was not seasonable; that in the initiatory correspondence the guardian had in substance promised an immediate acceptance or rejection of such offer as he might make, and that the offer was not, in fact, accepted within a reasonable time.

If it be conceded that for want of a more prompt acceptance the defendant had the right to retract his offer, or to refuse to

be bound by it when notified of its acceptance, still the defendant did not avail himself of such right. Two days elapsed before the fire after the defendant had actual notice that his offer was accepted, and he permitted the guardian to consider it sold, and made a bargain with a third person to haul it.

It is true that an offer, to be binding upon the party making it, must be accepted within a reasonable time: Peru *v.* Turner, 10 Maine, 185; but if the party to whom it is made makes known his acceptance of it to the party making it within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly. If he does not, he must be regarded as waiving any objection to the acceptance as being too late.

The question here is, In whom was the property in the hay at the time of its destruction?

It is true, as remarked by the Court in Thompson *v.* Gould, 20 Pick. 139, that "When there is an agreement for the sale and purchase of goods and chattels, and, after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction:" Tarling *v.* Baxter, 9 Dow. & Ryl. 276; Hinde *v.* Whitehouse, 7 East. 558; Rugg *v.* Minett, 11 Id. 210.

But we think that under the circumstances here presented the sale was completed and the property vested in the vendee. The agreement was completed by the concurrent assent of both parties: Adams *v.* Lindsell, 1 Barn. & Ald. 681; Mactier *v.* Frith, 6 Wend. 103. 21 Am. Dec. 262

In Dickson *v.* Yates, 5 Barn. & Adol. 313, PARKE, J., remarks (E. C. L. R. vol 27, p. 92): "Where there is a sale of goods, generally no property in them passes till delivery, because until then the very goods sold are not ascertained; but when, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very

appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

The omission to distinguish between general contracts for the sale of goods of a certain kind and contracts for the sale of specific articles will account for any seeming confusion in the decisions. Chancellor KENT, 2 Com. 492, states the doctrine thus: "When the terms of sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer." That doctrine was expressly approved by this Court in Wing *v.* Clark, 24 Maine, 366, 372, where its origin in the civil law is referred to. And this Court went further in Waldron *v.* Chase, 37 Maine, 414; and held that when the owner of a quantity of corn in bulk sold a certain number of bushels therefrom and received his pay, and the vendee had taken away a part only, the property in the whole quantity sold vested in the buyer, although it had not been measured and separated from the heap, and that it thenceforward remained in charge of the seller at the buyer's risk.

In the case at bar all the hay was sold. The quality had been ascertained by the defendant. The price was agreed on. The defendant had been told that he might take it, and had nothing to do but send the man whom he had engaged to haul it and appropriate it to himself without any further act on the part of the seller.

It is suggested in argument, though the point was not made at the trial, where the facts could have been ascertained, that there is no proof that the hay was properly pressed and branded according to statute requirements; and the case of Buxton *v.* Hamblen, 32 Maine, 448, is cited as an authority upon the strength of which the plaintiff should be nonsuited.

If the point were fairly open to the defendant in this stage of the case, it must still be said that the defendant himself

undertook to do the pressing, and did it; and if he did not do it properly, he cannot take advantage of his own wrong.

Judgment for plaintiff.

DARLINGTON, P. P., 79.
Olyphant *v.* Baker, 5 Denio, 379;
Odell *v.* Boston & M. Ry., 109 Mass. 50;
Rail *v.* Little Falls Lumber Co., 47 Minn. 422;
McCandlish *v.* Newman, 22 Pa. St. 460;
Webber *v.* Davis, 44 Maine, 147;
Whitcomb *v.* Whitney, 24 Mich. 486;
Webster *v.* Anderson, 42 Mich. 554.

Chattels not specified, Separation, Same Quality, and Value.

CHAPMAN *v.* SHEPARD.

Supreme Court of Errors, Connecticut, 1872.

39 Conn. 413.

SEYMOUR, J. The plaintiff brought his action of trover in three counts:—

1st. For the alleged conversion of three hundred and eighty bags of meal belonging to the plaintiff.

2d. For the conversion of seven hundred and fifty bags of meal belonging to the plaintiff and defendant as tenants in common.

3d. Alleging the meal to belong to the plaintiff and defendant and one John T. Gill as tenants in common.

It appears from the finding of facts by the Judge who tried the cause in the Superior Court, that the defendant, being the owner of a lot of bags of meal consisting of between five and six hundred, on the 10th of January, 1867, sold the lot to John T. Gill at the price of $2.40 per bag. The property was then in a schooner lying at Long Wharf, in New Haven. Afterwards, on the 25th of January, Gill sold to the plaintiff five hundred of these bags still remaining in the schooner. Of this sale the plaintiff notified the defendant, and the defendant gave the plaintiff authority immediately to remove the bags he had purchased. The plaintiff, however, told the de-

fendant that he was busy that day, but in a few days would send for them. The plaintiff a few days after this conversation, to wit, on the 4th of February, gave Gill his note, which was paid at maturity, for the price of the meal. On the 5th of February the plaintiff received one hundred and forty of the bags, and then took no more, because the defendant said the rest could not be removed until some corn, for which the bags were used as a bulk-head, had first been taken out. Gill became notoriously insolvent on the 7th of February. The defendant, upon due demand made by the plaintiff, refused to deliver the remaining three hundred and sixty bags of meal, and for such refusal this action was brought. The sale to Gill was for cash, and the defendant had not been paid for the meal by him so sold.

The judgment in the Superior Court was for the plaintiff, and the defendant seeks for a new trial.

The defendant's counsel claim that the title did not pass to Gill, for that the counting of the bags was an act remaining to be done as between the defendant and Gill; and they also claim a right to retain for the unpaid price. As between the defendant and Gill, these claims would perhaps be well founded; but we think they cannot prevail against the plaintiff upon the circumstances disclosed in the finding. The defendant gave the plaintiff authority to make immediate removal of the five hundred bags without intimating that Gill's title was not perfect, and thus left the plaintiff to pay the price to Gill. The defendant also treated the meal as belonging to the plaintiff by delivering one hundred and forty bags, and inducing him to allow the residue to remain without removal, to accommodate the defendant as a bulk-head for his corn, intimating still no infirmity in the title of Gill.

We think it is too late for the defendant to call Gill's title in question after having thus treated it as perfect and complete. The Superior Court very properly regarded the defendant as estopped from setting up the claims now made. If authority is needed for a point so plain, it may be found in Stoveld *v.* Hughes, 14 East, 308.

But the point most strenuously pressed by the defendant's counsel is this, that admitting Gill's title to have been such

that the defendant cannot be permitted to deny it, still, the plaintiff's title is defective. He bought of Gill five hundred out of a larger number of bags, and, with the exception of the hundred and forty delivered, the remaining three hundred and sixty were not separated from the mass, and they insist that until such severance the title did not pass; that until separation the contract was merely executory, and that the title remained in Gill, and therefore remained subject to the plaintiff's lien.

This claim comes with somewhat an ill grace from the defendant, inasmuch as it appears that the separation would have been made on the 5th of February had it not been on his request and for his convenience postponed until the bags should be no longer needed as a bulk-head for his corn. But the same considerations of estoppel which apply to the other branch of the case do not apply here, and we must therefore proceed to examine with some care the proposition of law on which the claim of the defendant now under consideration is founded.

The Superior Court having found the issue for the plaintiff, we cannot grant a new trial unless some point of law was wrongly decided. Upon the facts found we must regard the title as having passed from Gill to the plaintiff, unless the law is so that until and without the severance of the five hundred bags from the bulk of five or six hundred the title could not pass. The evidence detailed would warrant the Superior Court in finding that the parties intended an executed sale. The price was paid, and nothing remained to be done, as between buyer and seller, to complete the sale. The plaintiff was to take his meal when he wanted it, and as he should want it. Notice of the sale was given to the defendant, in whose custody the property was, who attorned to the plaintiff.

The case therefore depends upon the inquiry whether it be, as the defendant's counsel contend, an absolute rule of law that, upon the sale of a portion of a larger bulk, the contract remains in judgment of law executory until the portion sold is severed and separated for the purchaser from the mass. It must be conceded that this question is not free from difficulty, and that in regard to it respectable authorities differ.

In regard to a large class of cases the law is indisputably as the defendant claims. If I sell ten out of a drove of one hundred horses, to be selected, whether by myself or by the vendee, no title can pass until the selection is made. This rule prevails wherever the nature of the article sold is such that a selection is required, whether expressly provided for or not by the terms of the contract. If the articles differ from each other in quantity or quality or value, the necessity of a selection is clearly implied. In all such cases the subject-matter of the contract cannot be identified until severance, and the severance is necessary in order that the subject-matter of the contract may be made certain and definite.

But where the subject-matter of the sale is part of an ascertained mass of uniform quality and value, no selection is required, and in this class of cases it is affirmed by authorities of the highest character that severance is not, as matter of law, necessary in order to vest the legal title in the vendee to the part sold. The title may and will pass if such is the clear intention of the contracting parties, and if there is no other reason than want of separation to prevent the transfer of the title.

The leading case on this subject in England is that of Whitehouse *et al.*, Assignees of Townsend, *v.* Frost, 12 East, 614. That case has been the subject of some adverse criticism, but in respect to the point under consideration it seems to us to have been properly decided. The sale to the bankrupt was of ten tons of oil, in a cistern containing forty tons. There was no severance of the ten tons from the remaining thirty, and the Court held that the title vested in the bankrupt, so that his assignee could maintain an action of trover. The case was elaborately discussed at the bar and by the bench, and BLANC, J., says, "Something, it is said, still remained to be done, namely, the measuring off the ten tons from the rest of the oil. Nothing, however, remained to be done to complete the sale. The objection only applies where something remains to be done as between buyer and seller for the purpose of ascertaining either the quantity or the price, neither of which remained to be done in this case."

Nothing was said by the counsel or the Court in the case of Whitehouse *v.* Frost about a tenancy in common being created

by the contract. In a subsequent case, Busk *v.* Davis, 2 Maule & Selw. 397, the suggestion is made that the sale was of an *undivided quantity* of the oil, as it undoubtedly was; but though the property was intermixed with other property of the same kind, the *title* was held to be in severalty for the practical purpose of being protected by an action of trover, and it is such a property as includes the ordinary risk of ownership, which indeed would be true whether the title were in common or in severalty.

In the case of the oil it was the intention of the vendors to confer on the vendee a perfect right at any time to take his ten tons. The vendee was to have the same right to the ten tons that the vendors retained in the remaining thirty tons; and conceding such to have been the contract, why should the law disappoint that intention by an arbitrary rule of law against it?

Among the earliest cases which we find on this subject in this country is that of Pleasants *v.* Pendleton, reported in 6 Randolph's Virginia R. 473. The sale was of a certain number of barrels of flour, part of a larger parcel of such barrels, of the same brand and of equal value. The contract was complete in every respect except the separation of the barrels sold. The Court held that the title passed, one of the Judges saying, "These are not portions of a larger mass to be separated by weighing and measuring, but consist of divers separate and individual things, all precisely of the same kind and value, mixed with other separate and individual things of the same kind and between which there is no difference."

The leading case on this subject in the State of New York is that of Kimberly *v.* Patchin. The matter is elaborately discussed and the conclusion is well expressed in the reporter's syllabus: "Upon a sale of a specified quantity of grain its separation from a mass indistinguishable in quality or value with which it is included is not necessary to pass the title when the intention to do so is otherwise clearly manifested:" 19 New York R. 330. Judge COMSTOCK, in giving the opinion of the Court, remarks: "It is not necessary to decide whether the parties to the sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incident not usually belonging to that species of ownership."

In Waldron *v.* Chase, 37 Maine R. 414, it was decided that where the owner of a large quantity of corn in bulk sells a certain number of bushels therefrom and receives his pay, and the vendee takes away a part, the property in the part sold vests in the vendee, although it is not measured or separated from the heap.

In Pennsylvania (7 Penn. S. R. 140, Hutchinson *v.* Hunter) and in Ohio (7 Ohio, 467, Woods *v.* McGee) the Courts seem to hold that severance from the mass is absolutely essential to the vesting of title in the vendee. The opinion expressed in those cases is strongly in that direction, and yet the cases themselves would be decided by us precisely as they are decided by those Courts, for in the Pennsylvania case it appears that the subject of sale was part of a bulk of unequal quantities and values, and in the Ohio case the barrels of flour composing the bulk varied in value from twenty-five to fifty cents per barrel.

If in the case we have under our consideration any such fact appeared, we should decide in favor of the defendant, for our decision is based upon the fact that the bags of meal do not appear to have been in any respect different one from another.

The subject we are discussing seems to have perplexed the Courts of Massachusetts. In the case of Scudder *v.* Worster, 11 Cushing, 573, severance seems to be regarded by the Court as essential in cases of this kind to the transfer of the title, and yet in a somewhat more recent case of Weld *v.* Cutler, 2 Gray, 195, it was held that upon a mortgage of a portion of a larger mass of coal, the title passed to the mortgagee as against an assignee in bankruptcy of the mortgagor without and before separation, where the whole mass was put into the possession of the mortgagee to enable him to separate his part from the bulk. Such a delivery is so decided evidence of an executed mortgage as to leave no doubt of the intention of the parties, and yet until the separation is made that act remains to be done, and the decision recognizes the title of the mortgagee as valid and executed in him prior to the severance and while the property is intermixed and in common, and thus seems to recognize the doctrine established in Virginia, New York, and Maine, that such a title is possible in law. If it be in law possible, then its existence in a particular case must depend upon the clearly expressed wish and intention of the parties.

In view of the authorities which we have commented upon and of the reason of the thing, we have come to the conclusion —1st, that there is no legal bar which prevents the transfer of the title until actual separation of the five hundred bags from the mass; and 2d, that the facts in the case before us warrant the Superior Court in finding that the parties intended that the title should pass. The fact that the contract was executed on the plaintiff's part by the execution and delivery of his note, since paid, for the price, is very significant. There is no indication in any part of the case of anything executory remaining to be done by Gill. If the meal had been destroyed by fire and Gill had remained solvent, we think the plaintiff could not have successfully sued Gill for non-delivery as upon an executory agreement to count out, separate and deliver the five hundred bags. Gill's answer would be that he had done everything that he had contracted to do—everything which it was expected he should do. He had placed the property within the control of the plaintiff, who had assumed the control by taking away a part and allowing the residue to remain in the schooner for the defendant's convenience.

The title then, we think, passed, whether in severalty or in common it is unnecessary to decide, for there are counts in the plaintiff's declaration adapted to either alternative. If there were evidence by express words or by fair inference of an intention on the part of Gill to confer, and on the part of the plaintiff to take, a joint title in the mass of the bags in the proportion of five hundred to the whole number, the case would be entirely free from the embarrassments which have been under consideration. It is, of course, competent for the owner of six hundred bags of meal of equal quality and value to sell five-sixths of them, and to transfer the title to the five-sixths without severance. In such case the ultimate severance, if it ever takes place, is not as between the parties as vendor and vendee, but between them as tenants in common after the full completion of the sale. In such case after the sale the parties are tenants in common, with all the incidents of that relation.

But there is no evidence that Gill and the plaintiff intended a tenancy in common, unless such a relation is the necessary consequence of holding that the title passes while the property remains intermixed and unseparated. But if the intention of

the parties is clear that the title shall be transferred, we should hold that such intention must be carried into effect, and if the only mode of accomplishing the purpose of the parties is through the medium of a tenancy in common, then such tenancy is created. The authorities, however, do recognize a species of title in severalty to a definite portion of property remaining intermixed with other property of the same identical kind. Thus in Gardner *v.* Dutch, 9 Mass. 427, the action was replevin for seventy-six bags of coffee which were lying in common with other bags belonging to third persons. These seventy-six bags were not distinguished by any particular marks, or by a separation of them in any manner from the rest of the coffee. The Court says: "If the plaintiff was in fact tenant in common, he could not maintain replevin; but he was not tenant in common. Although the bags belonging to him had no distinguishing marks, he might have taken the number of bags and the quantity of coffee to which he was entitled by his own selection while they remained in the hands of Welman and Ropes." If then the title of the plaintiff was in a sense common, yet it was only quasi joint; a temporary community only, was contemplated. The plaintiff was entitled to take immediate possession of his portion without let or hindrance from his companion in the ownership of the mass. In the case of Whitehouse *v.* Frost it was held that this title is such that the plaintiff might maintain trover for the conversion of his property against his companion upon proof of mere demand and refusal to deliver to the plaintiff his share, which could not be done in ordinary cases of joint tenancy.

A new trial is not advised.

Pleasants *v.* Pendleton, 6 Rand. (Va.) 473; 18 A. D. 726
Kimberly *v.* Patchin, 19 N. Y. 330; 75 A. D. 334
Russell *v.* Carrington, 42 N. Y. 118; 1 A. R. 495
Beck *v.* Sheldon, 48 N. Y. 365;
Ropes *v.* Lane, 9 Allen, 502;
Webster *v.* Anderson, 42 Mich. 554; 36 A. R. 452
Jackson *v.* Anderson, 4 Taunt. 24;
Benjamin on Sales (1884), § 470;
Mackellar *v.* Pillsbury, 48 Minn. 396.

Contra—
Benjamin on Sales, page 432, and note;
Woods *v.* McGee, 7 Ohio, 2 pt. 127; 30 Am. Dec.
Commercial National Bank *v.* Gillette, 90 Ind. 268.

Certain acts to be performed by the purchaser.

SEDGWICK *v.* COTTINGHAM.

Supreme Court of Iowa, 1880.

54 Iowa, 512.

SEEVERS, J. The following facts were found by the Court:

1st. That in the month of July, 1878, the plaintiff, Sedgwick, resided in Portlandville, in the county of Plymouth, and State of Iowa, and that he was then and there engaged in the purchase and sale of grain.

2d. That the defendant, Cottingham, was at said time a resident of Benton, in the State of Wisconsin, and that he was then and there engaged in the milling business.

3d. That the plaintiff and defendant, on or about the 8th day of July, 1878, made an agreement that the plaintiff should ship to the defendant by rail from Portlandville, Iowa, viz., the Illinois Central Railroad, one carload of No. 1 hard wheat, to be billed to Cairo, Ill., to be milled by defendant in transit at Council Hill, Ill.; that defendant was to take said wheat from the car at said Council Hill, haul the same to his mill at Benton, Wis., ten miles distant from Council Hill, and pay for said wheat at the price of $1 per bushel, less freight, as soon as the wheat should be weighed on defendant's scales at his said mill.

4th. That by the terms of this agreement under which the said wheat was shipped, the same was to be delivered by the plaintiff, Sedgwick, to the defendant, Cottingham, on the track at Council Hill, in Jo Daviess County, Ill.

5th. That the plaintiff, Sedgwick, on the 9th day of July, 1878, shipped to the defendant, under the agreement heretofore formed, one car No. 1 hard wheat from Portlandville, Iowa, to Council Hill, Ill., which said car contained 400 bushels.

6th. That the freight on said car from Portlandville down to Council Hill, Ill., was $——.

7th. That said car arrived at Council Hill, Ill., at 11 A. M.,

July 11, 1878, in good condition, and with the wheat therein, 400 bushels in amount, in good condition.

8th. That on the arrival of said car at said Council Hill, Ill., July 11, 1878, the same was immediately side-tracked at a place where the wheat could have been taken therefrom, but at a place where it was unusual to side-track same and take grain therefrom, and at a place where grain could not have been removed therefrom with reasonable convenience.

9th. That no special reason is shown to prevent the placing of the car at a usual and reasonable place for unloading, nor is any such reason shown for permitting same to remain during the night where it was found side-tracked.

10th. That said car could, on demand, and within five minutes after demand, on July 11th, have been placed in a suitable and convenient place for the removal of the wheat therefrom.

11th. That at the time of arrival of the car at Council Hill, Ill., the following rule of the Illinois Central Railroad Company was in force at that place, to wit:—

"LOADING AND UNLOADING.

"All chartered cars or cars loaded with lumber, grain, or other property, which is to be unloaded by owners or consignee, whether at side-track or regular stations, must be unloaded within twenty-four hours after their arrival at their place of destination, or a charge of five dollars per day will be made for such car after that time till unloaded."

12th. That it was then the custom of the company, by its agent at Council Hill, Ill., always to give notice to parties residing a distance from the station of the arrival of freight or goods consigned to them.

13th. That the agent of the Illinois Central Railroad Company, on the same day of the arrival of the car containing the wheat, wrote and mailed notice to the defendant of its arrival at Council Hill, which notice reached the defendant in the then usual course of mail at 11 A. M., July 12, 1878; that said notice was the first the defendant had of the arrival of the said wheat or car, and that he immediately, on the receipt thereof, sent men and teams to get said wheat.

14th. That at about 12 P. M., July 11, 1878, the car containing said wheat was washed from the side-track by an unusual and extraordinary flow of water, and said wheat, by reason thereof, was completely and wholly lost.

15th. That said car had not, when the same was lost, been delivered to the defendant, Cottingham, or by him been received.

The important inquiry is whether there was a delivery of the wheat when it was placed on the side-track at Council Hill, for, under the contract, that was the place of delivery.

If it be conceded the railroad company was the agent of the plaintiff up to the time the wheat arrived at the place of destination, it does not follow this relation continued after that time.

When the wheat arrived at Council Hill, the contract on plaintiff's part was completed. The defendant should have been there to receive it. This duty necessarily followed. Not being there, the railroad company became his agent, because the plaintiff had done all he agreed to do. This being so, the plaintiff is not responsible for what was done by the defendant's agent. It is, therefore, immaterial whether the car was placed at a proper and convenient place for unloading or not.

But it is urged the defendant was not to pay for the wheat until it had been weighed on the defendant's scales, which were ten miles distant from the place of delivery. Suppose the defendant had taken the wheat into his custody by placing it in wagons, for the purpose of transporting it to his mill and scales, and it had been destroyed, without his fault or negligence, before reaching there, upon whom should the loss fall? Most clearly, we think, upon the defendant. Therefore, the weighing is not a pivotal matter. It was to be done by the defendant after he had received it into his actual custody, and after it had been delivered at the place fixed by the contract. A careful consideration of the third finding of fact will demonstrate, we think, that the weighing has reference only to the time of payment, and whether there had been a delivery or not is in no manner controlled or affected thereby.

As it became impossible to weigh the wheat without the fault

or negligence of the plaintiff, and he had fully complied with the contract as to the delivery, he should recover therefor.

Reversed.

DARLINGTON, P. P., 77; 2 Sch. on Per. Property, 252; Chamblee *v.* McKenzie, 31 Ark. 155; Shephard *v.* Lynch, 26 Kan. 377; Baker *v.* Guinn, 23 S. W. 604; Foley *v.* Felrath, 13 So. Rep. 485; Rugg *v.* Minett, 11 East, 210; Swanwick *v.* Sothern, 9 Ad. & El., 895; 36 Eng. Com. Law, 321.

SALE ON CREDIT.

THOMPSON *v.* WEDGE.

Supreme Court of Wisconsin, 1880.

50 Wis. 642.

Plaintiff sold to defendant at auction a cow and calf. The defendant not having enough money with him to pay therefor, was allowed by plaintiff to take the property home under a promise that he would pay the balance in a few days; but upon his failure to do so, plaintiff brings an action of replevin.

LYON, J. The plaintiff delivered the property in controversy to the defendant unconditionally, and gave him credit for the price. He waived the security required by the terms of the auction sale, by making the delivery without requiring it. He did not expressly reserve to himself the title to the property until the purchase-money should be paid, and there is nothing in the evidence tending to raise a presumption that he intended to do so. Neither is there any ground for claiming that the defendant obtained delivery of the property by fraud. Thus we have here the simple case of a sale of property on credit, and an absolute delivery thereof to the purchaser. Such sale and delivery passes the title, and it is not divested merely because the purchaser fails to pay for the property at the stipulated time. If authorities are required to propositions so plain and well established, the cases cited in the brief of counsel for

defendant, and many of those cited by counsel for plaintiff, abundantly sustain the doctrine. To these may be added the late case in this Court of The Singer Manuf'g Co. *v.* Sammons, 49 Wis. 316. That was a stronger case for the plaintiff than this, yet we held that the title passed. None of the cases in this Court, cited to show that the title to the property here in controversy remained in the plaintiff, meet the conditions of this case, for in none of them was credit given for the price, and an unqualified delivery of the property made to the purchaser.

We think the ruling of the learned county Judge, that the title to the cow and calf passed to the defendant by the delivery, was correct. We must therefore affirm the judgment.

By the Court. Judgment affirmed.

CONDITION SUBSEQUENT.

a.

"Sale or Return."

DEARBORN *v.* TURNER.

Supreme Judicial Court of Maine, 1836.

16 Maine, 17. 33 Am. D. 630

WESTON, C. J. The plaintiff delivered to Nason a cow and a calf, for which he took his written promise to return the same cow within a year, with a calf by her side, or to pay twenty-two dollars and fifty cents. We are very clear that the security of the plaintiff vested in contract; and that Nason, having the alternative to return or pay, the property passed to him, and he was at liberty to sell the cow. Tibbets *v.* Towle, 3 Fairf. 341, was a very different case. There the plaintiff expressly reserved to himself the title to the oxen until paid for. The case of Hurd *v.* West, 7 Cowen, 752, decides expressly

that where an alternative exists the title to the property, in a case like this, is transferred upon the delivery.

Plaintiff nonsuit.

Hurd *v.* West, 7 Cowen, 752; Stevens *v.* Cunningham, 3 Allen, 491; Crocker *v.* Gulliger, 44 Maine, 491; McKinney *v.* Bradlee, 117 Mass. 321; Dewey *v.* Erie Borough, 14 Pa. St. 211; Hall *v.* Ætna M'f'g Co., 30 Iowa, 215; Spickler *r.* Marsh, 36 Md. 222; Jones *v.* Wright, 71 Ill. 61; Ray *v.* Thompson. 12 Cush. 281; Moss *v.* Sweet, 46 Q. B., 71 Eng. Com. Law, 493; Humphries *v.* Carvalho, 16 East, 45.

b.

Manner of Payment.

SMITH *v.* DALLAS.

Supreme Court of Indiana, 1871.

35 Ind. 255.

DOWNEY, C. J. Smith and Hayes sued Dallas and Dallas on a written contract of November 17, 1864, by which the defendants acknowledged that they had received of the plaintiffs three hundred and ninety sheep, to keep on the following terms: they agreed to give annually one and a half pounds of wool per head, sheared *from said sheep*, well washed on the sheep, put up in good merchantable order, and delivered by the 15th day of June, to the plaintiffs or their assigns, at Rockville, Park County, Indiana. And on or before the 1st day of July, 1868, they promised to pay to the plaintiffs, or order, four dollars and fifty cents per head for the sheep, or if they paid the plaintiffs the above price between the delivery of the annual amount of wool and the 1st day of July following, of any year, and expressed the money to them at Iberia, Morrow County, Ohio, then the agreement was to be void. It was further stipulated that if the annual amount of wool was not delivered, the principal sum, as well as the wool, should be due, at the end of the year; and that they would pay the above amount of wool yearly until the contract was fulfilled, etc.

The plaintiffs allege that the defendants delivered to them five hundred and ninety-seven pounds of wool on the contract, August 24, 1865, which was the amount, and something more than the amount, due on the 15th day of June, 1865; that the defendants failed to deliver the five hundred and seventy-three pounds of wool due on the 15th day of June, 1866, and five hundred and eighty-five pounds due June 15, 1867, thereby rendering the contract both as to principal and wool due, stating values and amounts; wherefore, etc. The defendants answered:—

1. They admit the execution of the agreement, but say that at the time they received the sheep they were affected with a contagious disease; one-half of them died soon after they were received, and before shearing time, 15th of June, 1865, and the residue before the shearing season in the year 1866, all from said contagious disease, without any fault of the defendants. They allege the delivery of the five hundred and ninety-seven pounds of wool, which they allege was all the wool they ever sheared from the sheep, and more than one and a half pounds per head; wherefore, etc.

2. That the plaintiffs, at the time of executing the agreement, represented themselves as dealers in sheep and well acquainted with their diseases; that they had imported the sheep from Ohio; that they were sound, healthy and free from all disease; that the defendants were ignorant of the nature of sheep and their diseases, and relied on the plaintiffs' representations, which the plaintiffs knew; that the sheep were fatally unsound when received, by reason whereof they became entirely worthless, sickened and died long before the commencement of this suit; wherefore, etc.

3. The same representations, etc., as in the preceding paragraph, and that the defendants held fifty-five other sheep with which they desired the purchased sheep to run, which the plaintiffs knew; that before they knew that said sheep so purchased from the plaintiffs were diseased, their other sheep, from running with them, became diseased, and they too died; that they expended one thousand dollars in doctoring, feeding, and taking care of them, and have been damaged four thousand

dollars, which they set up as a counter-claim, and ask judgment for one thousand dollars.

4. That the plaintiffs represented that they were dealers in sheep and acquainted with their diseases, and when they sold said sheep to the defendants represented them to be sound and free from disease, and warranted them to be sound and healthy; that they were unsound and diseased with a fatal and deadly contagion, of which the defendants were ignorant, which rendered them valueless and caused them to die; that said warranty was untrue, false, and fraudulent, and made with intent to and did mislead and defraud the defendants, and induced them to enter into the contract sued on; that the defendants refused to take the sheep without a warranty of their soundness; that the plaintiffs then warranted them to be sound, to mislead and defraud the defendants, and induce them to purchase the sheep; that the warranty was false and fraudulent, and the defendants were deceived thereby and induced to enter into the contract; that when the contract was executed there was an understanding and agreement between the parties thereto that it should not embrace the whole of the terms of the agreement; that the warranty should stand and be binding, but should not be inserted in the writing, but should remain a distinct part of the whole agreement, supplementary to the written agreement, to defraud the defendants; and that they have been damaged thereby to the amount of four thousand dollars; wherefore, etc.

5. Payment.

The plaintiffs demurred to the first and fourth paragraphs of the answer, which demurrer was overruled, and they excepted. There was then a reply by general denial of the whole answer. Trial by jury; verdict for the plaintiffs for two hundred and fifty dollars. Special findings to questions, as follows:—

"1. Were the sheep sound at the time of the sale to the defendants?" Ans. "We think they were not."

"2. At the time of such sale, did the agent of the plaintiffs, for the purpose of defrauding the defendants, warrant the sheep sound?" Ans. "We think he did not."

"3. Did the agent of the plaintiffs make a warranty of the

soundness of the sheep prior to executing the contract?" Ans. "We think he did."

"4. Were the defendants prevented from delivering the wool specified in the contract in the years 1866 and 1867, or either of them, from any contagious disease in the sheep at the time of the purchase by the defendants?" Ans. "We think they were."

There was a motion for a new trial for eleven reasons, which was overruled.

Three specifications are made in the assignment of errors. 1. The overruling of the demurrer to the first paragraph of the answer. 2. The overruling of the demurrer to the fourth paragraph of the answer. 3. The refusal to grant a new trial.

1. The first question is as to the overruling of the demurrer to the first paragraph of the answer. The defendants insist that as the suit was commenced on the 24th of July, 1867, before the time when the sheep were to be paid for, which was to be done on the 1st day of July, 1868, if the sheep had died from disease without their fault, before the time when the payment of wool was to be made in June, 1866, as the wool was to be shorn from the same sheep sold, they were excused from the delivery of the wool by the death of the sheep, which rendered it impossible to perform that part of their contract: and that, therefore, the plaintiffs cannot claim that the principal sum became due by the failure to deliver the wool.

We think this position is wholly untenable. The defendants, by delivering the wool each year as agreed, might have had time to pay for the sheep till July 1, 1868. But if they failed to deliver the wool as it became due, they then became liable to pay for the sheep and for the wool which they had so failed to deliver, and both might be sued for at any time after such failure. The property in the sheep passed by the delivery under the contract to the defendants, and they were thenceforth at their risk. That they died from disease is no better reason for not complying with the contract than if they had been killed, or had strayed away and been lost. The plaintiffs were not insurers of their continued existence. The parties, by the contract, provided for a failure to deliver the wool, by making the defendants liable for the value of it. This must

be construed to cover a failure from whatever cause it may have originated. There is a distinction between a contract to do a thing which is possible in itself, and one whereby the party engages to do something which is absolutely impossible; for in the former case the contract subsists, notwithstanding it is beyond the power of the party to perform it, it being deemed to be his own fault and folly that he did not thereby expressly provide against contingencies and exempt himself from responsibility in certain events. And, therefore, in such a case, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by, or within the control of, the party: Chitty on Con. 803. See, also, Wood *v.* Long, 28 Ind. 314.

The demurrer to the first paragraph of the answer should have been sustained. The instruction given by the Court based on the same view of the law was not correct, and should not have been given.

2. The next question relates to the fourth paragraph of the answer. We do not see the necessity or propriety of blending fraud and warranty as is done in this paragraph. But regarding it as a defence based on the false and fraudulent representations, we are inclined to hold it to be good. If we were compelled to regard it as setting up a warranty, made by parol at the time of entering into the written contract, we should be compelled to hold it bad. The parties could not, by a parol agreement that a part of their contract should not be reduced to writing, change the rule of law which excludes parol evidence in such a case, on account of its tendency to vary the written contract.

Several questions are argued and presented for decision arising under the motion for a new trial and the action of the Court in overruling it.

3. The Court allowed the defendants to introduce evidence on the trial, that it was agreed, at the time of making the contract for the purchase of the sheep, that they might sublet as many as they wanted to of the sheep, to responsible persons, upon the same terms of their contract with the plaintiffs, and when so sublet they were to be credited for that number; and that accordingly they did sublet some of the sheep to other per-

sons, etc. On this subject the Court instructed the jury that if the plaintiffs authorized the defendants to bail out any portion of the sheep, on the same terms on which the defendants took them from plaintiffs, and the defendants did so bail out a portion of said sheep, and the plaintiffs accepted the said bailment contract in part discharge of defendants' contract, then the jury, if they find for the plaintiffs, must allow the defendants a credit on their contract in a sum equal to the amount of the said bailment contract. There was an exception taken to the ruling of the Court in admitting this evidence and giving this direction to the jury.

There was nothing in the pleadings to warrant this evidence, and it was inadmissible, because it was at variance with the written contract: McClure *v.* Jeffrey, 8 Ind. 79; Oiler *v.* Gard, 23 Id. 212. In addition to this, the Court seems to have regarded the contract on which the suit was brought, and that by which the sheep were sublet, as it is called in the charge, as contracts of bailment. We do not so regard the contract in this case, as we have already intimated.

4. Notwithstanding there was no general denial pleaded, it was necessary for the plaintiffs to prove the amount of their claim resulting from the non-delivery of the wool, to entitle them to full damages. They demanded the right to open and close, which was denied them. This was error, as we have decided in the case of Fetters *v.* The Muncie National Bank, 34 Ind. 251.

5. As to the sufficiency of the evidence to sustain the verdict of the jury, we have concluded to express no opinion, in view of the fact that the case will probably be tried again, and will have to be reversed on the grounds above stated.

There are some other points made in the motion for a new trial, but no others for which the case ought, in our opinion, to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Chamberlain *v.* Dickey, 31 Wis. 68;

Woodward *v.* City of Boston, 115 Mass. 81;

See Strang *v.* Taylor, 2 Hill, 326.

2.

EXECUTORY SALE.

a.

Construction of thing to be sold.

ANDREWS *et al. v.* DURANT *et al.*

Court of Appeals, New York, 1854.

11 N. Y. 35.

DENIO, J. In general, a contract for the building of a vessel or other thing not yet *in esse* does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery and approved by such party. All the authorities agree in this: Towers *v.* Osborne, 1 Stra. 506; Mucklow *v.* Mangles, 1 Taunt. 318; Johnson *v.* Hunt, 11 Wend. 139; Crookshank *v.* Burrill, 18 John. 58; Sewall *v.* Fitch, 8 Cow. 215; Mixer *v.* Howarth, 21 Pick. 205. And the law is the same though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly. In Mucklow *v.* Mangles, which arose out of a contract for building a barge, the whole price was paid in advance, the vessel was built and the name of the person who contracted for it was painted on the stern, yet it was held that the title remained in the builder. In Merritt *v.* Johnson, 7 John. 473, where a sloop was agreed to be built and one-third of the price was to be paid when one-third of the work was done, two-thirds when two-thirds were done, and the balance when it was completed, and before it was finished it was sold on execution against the builder after more than a third had been done and more than that proportion of the price had been paid, the Court decided that the vessel was the property of the builder and not of the person who engaged it to be constructed.

Where, during the course of the transaction, the vessel or

other thing agreed to be built is identified and appropriated so that the mechanic would be bound to complete and deliver that particular thing, and could not, without violating his contract, substitute another similar article though otherwise corresponding with the agreement, there would seem to be more reason for holding that the property was transferred; still it has never been held that this was enough to pass the title. In Laidler *v.* Burlinson, 2 Mees. & Welsb. 602, the vessel was about one-third built when the contract was made. The builder and owners agreed to finish that particular vessel in a manner specially agreed upon for a price which was the equivalent for the finished vessel. Before it was completed the builder became bankrupt, and the possession passed into the hands of his assignee. The Court of Exchequer held the true construction of the contract to be that the title was to pass when the ship was completed and not before. The parties only agreed to buy a particular ship *when complete*, and although the builder could not comply with the contract by delivering another ship, still it was considered an executory contract merely. In Atkinson *v.* Bell, 8 Barn. & Cress. 277, 15 Eng. Com. Law, the same principle was held in respect to a contract for making spinning machinery, and in Clark *v.* Spence, 4 Adolph. & El. 448, 31 Eng. Com. Law, which is the case principally relied on by the defendants, it was admitted by the Court that the appropriation of the particular ship to the contract then in question, by the approval of the materials and labor by the superintendent, did not of itself vest the property in the purchaser until the whole thing contracted for had been completed.

In the case before us, it cannot be denied that the barge, as fast as its several parts were finished, with the approval of the superintendent, became specifically appropriated to the fulfillment of this contract, so that Bridger & Company could not have fulfilled their agreement with the defendants in any other way than by completing and delivering that identical boat. This results from the consideration that the superintendent could not be called upon to inspect and approve of the work and materials of another barge, after having performed that duty as to one; so that the contract would be broken up unless it applied itself to this vessel. But it is clear that this

circumstance alone does not operate to transfer the title. The precise question in this case is whether the concurrence of both particulars—the payment of parts of the price at specified stages of the work, and the intervention of a superintendent to inspect and approve of the work and materials—produces a result which neither of them separately would effect. It is, no doubt, competent for the parties to agree when and upon what conditions the property in the subject of such a contract shall vest in the prospective owner. The present question is, therefore, simply one of construction. The inquiry is whether the parties intended by the provisions which they have inserted in their contract, that as soon as the first payment had become payable and had been paid, the property in the unfinished barge should vest in the defendants, so that thereafter it should be at their risk as to casualties and be liable for their debts, and pass to their representatives in case of their death. Such an agreement would be lawful if made, and the doubt only is whether the parties have so contracted.

The Courts in England, under contracts in all material respects like this, have held that the title passed. In Woods *v.* Russell, 5 Barn. & Ald. 942, 7 Eng. Com. Law, the question came before the Court of King's Bench, and ABBOT, C. J., distinctly declared his opinion that the payment of the instalments under such a contract vested the property in the ship in the party for whom it was to have been constructed. But there was another feature in the case upon which it was finally decided. The builder had signed a certificate for the purpose of enabling the other party to procure the vessel to be registered in his name, and it was so registered accordingly while it was yet unfinished and before the question arose. The Court held that the legal effect of signing the certificate for the purpose of procuring the registry was, from the time the registry was complete, to vest the general property in the party contracting to have the ship built. This case was decided in 1822, and was the first announcement of the principle upon which the defendants' counsel rely in the English Courts. The case of Clark *v.* Spence was decided in 1836. It arose out of a contract for building a vessel, which contained both the features of superintendence and of payments according to specific stages of the

work, as in Woods *v.* Russell, and as in the contract now before the Court. The Court of King's Bench was clearly of opinion that as fast as the different parts of the vessel were approved and added to the fabric they became appropriated to the purchaser *by way of contract*, and that when the last of them were so added and the vessel was thereby completed it vested in the purchaser. The Court conceded that by the general rules of law, until the last of the necessary materials was added, the thing contracted for was not in existence; and they said they had not been able to find any authority for holding that while the article did not exist as a whole and was incomplete, the general property in such parts of it had been from time to time constructed should vest in the purchaser, except what was said in the case of Woods *v.* Russell; and that was admitted to be a dictum merely, and not the point on which the case was decided. The Court, however, decided upon the authority of that case, though with some hesitation, as they said, that the rights of the parties in the case before it, after the making of the first payment, were the same as if so much of the vessel as was then constructed had originally belonged to the party contracting for its construction and had been delivered by him to the builder to be added to and finished; and they said it would follow that every plank and article subsequently added would, as added, become the property of the party contracting with the builder. The dictum in Woods *v.* Russell was incidentally referred to as the law in Atkinson *v.* Bell, 8 Barn & Cress. 277, 15 Eng. Com. Law, and the doctrine there stated, and confirmed in Clark *v.* Spence, was assumed to be correct in Laidler *v.* Burlinson, before referred to. It has also been generally adopted by systematic writers in treatises published or revised since the decision of Clark *v.* Spence, that case and Woods *v.* Russell being always referred as the authority on which it rests: Story on Sales, §§ 315, 316; Chit. on Cont. 378–9; Abbot on Ship. 4, 5.

It is scarcely necessary to say that the English cases since the revolution are not regarded as authority in our Courts. Upon disputed doctrines of the common law they are entitled to respectful consideration; but where the question relates to the construction or effect of a written contract, they have no

greater weight than may be due to the reasons given in their support. Can it then be fairly collected from the provisions of this contract that the title to the unfinished barge was to be transferred from the builder to the other party upon the making of the first payment, contrary to the principle well settled and generally understood that a contract for the construction of an article not in existence is executory until the thing is finished and ready for delivery? In the first place, I should say that so marked a circumstance would be stated in words of unequivocal import; and would not be left to rest upon the construction, if a change of property was really intended. The provision for superintendence by the agent of the intended owner, though it serves to identify and appropriate the article as soon as its construction is commenced, does not, as we have seen, work any change of property. Such would not ordinarily be the intention to be deduced from such a circumstance. Many of the materials of which a vessel is composed are ultimately covered so as to be concealed from the eye when it is finished; and as the safety of life and property is concerned in the soundness and strength of these materials, it is but a reasonable precaution to be taken by one who engages a vessel to be constructed, to ascertain as the work progresses that everything is staunch and durable; and such a provision, as it seems to me, does not tend to show a design that there shall be a change of property as fast as any materials or work are inspected and approved. It amounts only to an agreement that when the whole is completed the party will receive it in fulfillment of the contract. The provision for advances at particular stages of the work is a very usual one where an expensive undertaking is contracted for, and it only shows that the party advancing is willing thus to assist the artisan provided that he can see that the work is going on in good faith, so as to afford a reasonable prospect that he will realize the avails of his expenditure in a reasonable period. The argument for the defendants would be somewhat stronger if we could say that the amount to be advanced at the several stages mentioned was understood by the parties to be the price or equivalent for the labor and materials already expended. This by no means appears, but, on the contrary, there is strong reason to believe

that in this case a considerable portion of the price was to be at all times kept back in order to secure the speedy completion of the contract. When Bridger & Co. failed only three thousand dollars of the five thousand had been paid, and they would not be entitled to any more until the barge was finished, and yet it cost only seven hundred dollars to complete it. This renders it improbable that the parties could have intended the sale and purchase of so much as was done at the several stages of the work at which payments were to be made, if indeed such a contract were not in itself so much out of the course of the ordinary conduct of parties as not to be assumed without unequivocal language.

The decision in Clarke *v.* Spence is placed very much upon the idea that parties may have contracted in reference to the doctrine announced in Woods *v.* Russell. That argument can have no force here, but, on the contrary, the inference to be drawn from our own cases, and particularly from Merritt *v.* Johnson, would be that the title remained in the builder under such a contract until the completion of the vessel.

The foregoing considerations have led me to the conclusion that the modern English rule is not founded upon sufficient reasons and that it ought not to be followed. The judgment of the Supreme Court should, therefore, be reversed and a new trial ordered.

DARLINGTON, P. P., 77.
McConihe *v.* N. Y. & E. Ry., 20 N. Y. 495;
Fairfield *v.* Nye, 60 Maine, 372;
Shaw *v.* Smith, 48 Conn. 306;
Johnson *v.* Hunt, 11 Wend. 139;
Mucklow *v.* Mangles, 1 Taunt. 318.

b. concurrent

Conditions ~~Precedent.~~

Payment and Delivery.

See 336 for 1 248 ante

PAUL *v.* REED *et al.*

Supreme Judicial Court of New Hampshire, 1872.

52 N. H. 136.

Statement of facts: One Mr. Reed sold Dana R. Moody a hog, some flour, butter, a bedstead, some sugar and salt, at an agreed price of $30.30 cash on delivery. The hog was put into a separate pen, and the sugar put with other sugar of Mr. Moody's. Just as Mr. Moody was to hand Mr. Reed the cash, the sheriff, standing by, served a process on Mr. Moody, as trustee (garnishee), in an action of one Azor Paul against Mr. Reed. Whereupon Mr. Moody refused to pay Mr. Reed the cash, and Reed reclaimed his property; the Court, however, held the trustee chargeable with the $30.30, Mr. Reed duly excepting.

BELLOWS, C. J. Unless the principal defendant had another hog and other provisions or fuel, so that the value of his provisions and fuel exceeded twenty dollars, all the articles sold to the trustee were exempt from attachment. As there is no proof that he had another hog, or more provisions, or fuel, the Court cannot find that he had such; and, therefore, unless the title in these goods had vested in the trustee so that he became indebted for them, the trustee must be discharged.

The question then is, whether the goods were delivered so as to vest the title in the trustee.

The proof tends to show that the sale was for cash, and not on credit; so the trustee testifies, and this is just what would have been intended had no time of payment been stipulated: 2 Kent's Com. *496, *497; Story on Con., sec. 796; Noy's Maxims, 87; Ins. Co. *v.* De Wolf, 2 Cow. 105. The case, then, stands before us as a contract of sale for cash on delivery; in

such case the delivery and payment are to be concurrent acts; and, therefore, if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer. The seller may, to be sure, waive the payment of the price, and agree to postpone it to a future day, and proceed to complete the delivery; in which case it would be absolute, and the title would vest in the buyer. But in order to have this effect, it must appear that the goods were put into the buyer's possession with the intention of vesting the title in him.

If, however, the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, the refusal to make payment would be such a failure on the part of the buyer to perform the contract as to entitle the seller to put an end to it and reclaim the goods.

This is not only eminently just, but it is in accordance with the great current of authorities, which treat the delivery, under such circumstances, as conditional upon the immediate payment of the price: 2 Kent's Com. *497; Chitty on Con., 9th Am. ed., *350, note 1 and cases; Story on Con., secs. 796, 804; Palmer *v.* Hand, 13 Johns. 434; Marston *v.* Baldwin, 17 Mass. 605; Leven *v.* Smith, 1 Denio, 573, and cases cited. So the doctrine was fully recognized in Russell *v.* Minor, 22 Wend. 659, where, on the sale of paper, it was agreed that the buyer should give his notes for it on delivery, and the delivery was in several parcels. On delivery of the first, the seller asked for a note; but the buyer answered that he would give his note for the whole when the remainder was delivered, and the parcel now delivered could remain until then. When the rest was delivered the defendant refused to give his note; and the Court held that the delivery of all the goods was conditional, and that the seller might maintain replevin for all the goods. The general doctrine is fully recognized in this State in Luey *v.* Bundy, 9 N. H. 298, and more especially in Ferguson *v.* Clifford, 37 Id. 86, where it is laid down that if the delivery takes place

when payment is expected simultaneously therewith, it is in law made upon the condition precedent that the price shall forthwith be paid. If this condition be not performed, the delivery is inoperative to pass the title to the property, and it may be instantly reclaimed by the vendor.

The question then is, whether the delivery here was absolute, intending to pass the title to the vendee and trust him for the price, or whether it was made with the expectation that the cash would be paid immediately on the delivery. This is a question of fact, but it is submitted to the Court for decision. Ordinarily it should be passed upon at the trial term; but where the question is a mixed one of law and fact, as it is here, it may not be irregular, if the Judge thinks it best, to reserve the entire question for the whole Court. Assuming that the questions both of law and fact are reserved, we find that the goods were sold for cash, and of course that the delivery of the goods and the payment of the price were to be simultaneous; and, accordingly, when a part had been delivered and the seller was figuring up the amount, and the buyer had taken out his money to pay the price, the act was arrested by the service of this process.

The evidence relied upon to prove the delivery to be absolute and intended to pass the title at all events is simply and solely the changing of the hog into another pen and mixing the sugar with other sugar of the buyer. Without this mixing of the sugar, the case would be just the ordinary one of a delivery of the goods with the expectation that the buyer would at once pay the price; and we think that circumstance is not enough to show a purpose to make the delivery absolute, but rather a confident expectation that the buyer would do as he had agreed and pay the price at once. The case of Henderson *v.* Lauck, 21 Pa. St. 359, was very much like this. There was a sale of corn, to be paid for on the delivery of the last load; and as the loads were delivered the corn was placed in a heap with other corn of the buyer, in the presence of both parties. On the delivery of the last lot the buyer failed to pay, and the seller gave notice that he claimed the corn, and brought replevin, which was held to lie—the Court regarding the delivery as conditional, and the plaintiff in no fault for the intermingling

of the corn. It is very clear that the intermingling of the sugar does not, as matter of law, make the delivery absolute; and I think, as matter of fact, it is not sufficient to prove an intention to pass the title absolutely. When the buyer declined to pay the price, the seller at once reclaimed the goods, and so notified the buyer, who did not object to giving up the sale if he could safely do so.

In respect to the question now before us, it is not material for what reason the buyer declined to pay for the goods, although the service of the trustee process might shield him from damages in a suit by the seller for not taking and paying for the goods. For the purposes of this question, it is enough that the buyer did not pay the price, and thus gave the seller a right to reclaim the goods, which he did at once. The goods themselves were exempt from attachment; and the fact that the trustee process was designed to intercept the price of those goods could not affect his right to reclaim them when the buyer declined to pay the price.

The exception must therefore be sustained, and the trustee discharged.

Whitney *v.* Eaton *et al.*, 15 Gray, 225;
Young *v.* Kansas Mfg. Co., 2 So. Rep. 817; 23 Fla. 394;
Simmons *v.* Green, 35 Ohio St. 104;
Robison *et al.* *v.* Tyson, 46 Pa. St. 286;
Council Bluffs Iron Works *v.* Cuppey, 41 Iowa, 104;
Posey *v.* Scales, 55 Ind. 282;
Cleveland *v.* Sterrett, 70 Pa. St. 204;
Metz *et al.* *v.* Albrecht, 52 Ill. 491.

Inspection, Measuring, Weighing, etc.

LINGHAM *v.* EGGLESTON.

Supreme Court of Michigan, 1873.

27 Mich. 324.

COOLEY, J. The contest in this case relates to a sale of lumber by Eggleston to Lingham and Osborne, and the question involved is, whether the contract between the parties amounted

to a sale *in presenti* and passed the title, or merely to an executory contract of sale. The lumber, subsequent to the contract and before actual delivery to the purchasers, was accidentally destroyed by fire, and the purchasers now refuse to pay for it, on the ground that it never became their property. The action was brought by Eggleston for goods bargained and sold, and in the Court below he recovered judgment.

There appears to be very little dispute about the facts. The lumber was piled in Eggleston's mill yard at Birch Run. In September, 1871, he sold his mill to a Mr. Thayer, reserving the right to leave the lumber in the yard until he disposed of it. To most of the lumber the plaintiff had an exclusive title; but there were four or five piles which he owned jointly with one Robinson. The whole amount was from 200,000 to 250,000, excluding Robinson's share in the four or five piles. The defendants went to the mill yard September 23, 1871, and proposed to buy the lumber. Plaintiff went through the yard with them, pointed out the several piles, and designated those in which Robinson had an undivided interest, and also some piles of shingles which they proposed to take with the lumber. After examining the whole to their satisfaction, the defendants agreed upon a purchase, and the following written contract was entered into:—

"Flint, September 23, 1871. Lingham and Osborne bought from C. Eggleston, this day, all the pine lumber on his yard at Birch Run, at the following prices: For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M., to be paid for as follows: Five hundred dollars to-day, and five hundred dollars on the 10th of October next; the balance, one-half on 1st day of January, A. D. 1872, and the rest on the 1st day of February following; said lumber to be delivered by said Eggleston on board of cars when requested by said Lingham and Osborne, which shall not be later than 10th of November next. Also, some shingles, at two dollars per M., for No. 2, and four dollars for No. 1.

(Signed) "LINGHAM & OSBORNE.
CHAUNCEY EGGLESTON, JR."

The five hundred dollars mentioned in this contract to be paid at the time of its execution was paid. A few days later defendants went to the mill yard in plaintiff's absence and loaded two cars with the lumber. He returned before they had taken them away, and helped them count the pieces on the cars, but left them to measure them afterwards. At this time the lumber in the piles had not been assorted, inspected, or measured. There was disagreement between the parties as to whether they had fixed upon a person to inspect the lumber, the defendants claiming that such was the fact. On the 9th day of October, 1871, Lingham met plaintiff on the cars at Flint, and told him the fires were raging near Birch Run; that the lumber yard was safe yet, but that there were eight cars standing on the side track, and he had better go up to Birch Run and load what were there, and get what lumber he could away; plaintiff took the first train for the purpose, and while on the train the train boy gave him the following note from Lingham:—

"Holly. Mr. Eggleston: You may load, say ten thousand, if you think best, on each car, and we can have it inspected as it is unloaded. I will try and come up to-morrow."

When plaintiff reached Birch Run the fire was raging all about the mill, and that, with all the lumber in the yard, was soon totally destroyed by fire. Such are the undisputed facts in the case; and upon these the jury were instructed in substance that a completed contract of sale was made out, and the plaintiff was entitled to recover the purchase price.

Where no question arises under the Statute of Frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory must usually be determined upon the intent of the parties, to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties may settle this by the express words of their contract; but if they fail to do so, we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated, so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be

determined. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive.

In Blackburn on Sales, 120, the rule on this subject is very clearly and correctly stated as follows: The question, the author says, is "a question depending upon the construction of the agreement; for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement; not before. In this, as in other cases, the parties are apt to express their intentions obscurely; very often because the circumstances rendering the point of importance are not present to their minds, so that they really had no intention to express. The consequence is that, without absolutely losing sight of the fundamental point to be ascertained, the courts have adopted certain rules of construction which, in their nature, are more or less technical. Some of them seem very well fitted to aid the Court in discovering the intention of the parties; the substantial sense of others may be questioned. The parties do not contemplate a bargain and sale till the specific goods on which their contract is to attach, are agreed upon. Where the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfilment of any conditions; and when by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable shape, or when anything is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transfer of the property. But as these are only rules for the construction of the agreement, they must yield to any thing in the agreement which clearly shows a contrary intention. The parties may lawfully agree to an immediate transference of the property in the goods, although the seller is to do many things to them before they are to be delivered; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please." In Benjamin on Sales, 214, 215, the same doctrine is laid down,

and it is said that "nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel." And see Ib. 221, *et seq.*

Upon this general principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a complete sale where many circumstances were wanting and many things to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights.

The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards. A striking case in illustration is that of Young *v.* Mathews, Law R. 2 Exch. 127, where a large quantity of bricks was purchased in kilns. Only a part of them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as in the nature of the case was practicable was made. The Court held that the question was one of intention merely, and that it was evident the parties intended the title to pass. To the same effect are Woods *v.* Russell, 5 B. & Ald. 942, 7 Eng. Com. Law; Riddle *v.* Varnum, 20 Pick. 280; Bates *v.* Conklin, 10 Wend. 389; Olyphant *v.* Baker, 5 Denio, 379; Bogy *v.* Rhodes, 4 Greene (Iowa), 133; Crofoot *v.* Bennett, 2 N. Y. 258; Cunningham *v.* Ashbrook, 20 Mo. 553.

So, if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity and quality, and consequently the price to be paid, are still to be determined by the vendee: Turley *v.* Bates, 2 H. & C. 200; Kohl *v.* Lindley, 39 Ill. 195.

And even if something is to be done by the vendor, but only

when directed by the vendee, and for his convenience, as, for instance, to load the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding: Whitcomb *v.* Whitney, 24 Mich. 486; Terry *v.* Wheeler, 25 N. Y. 520.

But the authorities are too numerous and too uniform to justify citation which hold that where any thing is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted.

A learned author from whom we have already quoted says of this, that "the rule seems to be somewhat hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money and an exchange for any thing else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in the distinction. In general the weighing, etc., must in the nature of things be intended to be done before the buyer takes possession of the goods; but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and, therefore, does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided they be of value." But the same writer, with candor and justice, adds that this rule is now "firmly estab-

lished as English law:" Blackburn on Sales, 153. And see Turley *v.* Bates, 2 H. & C. 200, in which this passage is quoted and the conclusion treated as unquestionable.

What then are the facts in this case from which the intent of the parties is to be inferred? The lumber was specifically designated, so that no question of identity could arise. It was not delivered, and the vendor was to place it on board the cars, if desired to do so, within a time specified; but as in any event the vendees were to take it at Birch Run, and it was optional with them to load it on the cars themselves or to have the vendor do it for them, and they had no right to require that he should do so after the day named, we think the circumstance that actual delivery was not made is not one of very much importance in the present discussion. What is of more importance is, that neither the quality nor the quantity was determined; and the evidence in the case shows that as to these there might very well be, and actually were, great differences of opinion. The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had.

It will be observed that the contract did not provide how or by whom the inspection and measurement should be made. It was certainly not the right of either party to bind the other party by an inspection and measurement of his own; it was the right of both to participate, and we must suppose such was the intent, unless something clearly appears in the case to show the contrary. Nothing of that nature appears in the record except the disputed evidence of defendants, that a person was agreed upon for the purpose. The note sent by Lingham to Eggleston proposing that the eight cars be loaded, and that the vendees make the proper inspection, was a mere proposition, and never acted upon. It is very evident Eggleston was under no obligation to trust this important transaction exclusively to the vendees, and we have no right to infer that he would have done so. It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transference of the title—nothing to the contrary appearing—the Court should have so instructed the jury.

The instructions given were in substance directly to the contrary.

It follows that the judgment must be reversed, with costs, and a new trial ordered.

Selection, Different Qualities, and Value.

FOOT *et al. v.* MARSH *et al.*

Court of Appeals, New York, 1873.

51 N. Y. 288. Not in Library.

GRAY, C. The principal question presented for our consideration arises upon the defendants' exception to that portion of the charge given by the Judge to the jury, in which he stated, in substance, that if no agreement was made or authority given to the defendants to set apart for the plaintiffs the oil described in the contract, that then the contract, from its terms, became a contract to deliver 4000 gallons of oil when called for, and that the defendants, in order to comply with the call, were bound to have that quantity on hand whenever the call should be made. This case is by the defendants likened to the case of Kimberly and others *v.* Patchin, 19 N. Y. 330, and the ground upon which this portion of the charge is claimed to be erroneous is that the contract, when read by the light of the circumstances surrounding it, is in principle like the contract in that case, for the sale of 6000 bushels of wheat, parcel of 6249 bushels, at seventy cents per bushel, of which no separation or manual delivery was made; but as a substitute for a manual delivery, and to constitute the contract for its sale an executed—not an executory—contract, the vendor gave the purchaser his receipt for it, agreeing to deliver it to his order, free of all charges: whereupon the vendor was held to have constituted himself the bailee of the wheat, and to have thenceforth stood in that relation to the purchaser and the property. To render the contract effectual as an executed contract from the time it was made, the purchaser must have been invested with the right, after demand, to take the property. This was a right the defendants at the time of making the sale had no power to

confer, they not being at the time the owners of any portion of it; nor did they, in the place of a manual delivery, give to the plaintiffs their receipt for it, and thus attempt to constitute themselves the bailees of the plaintiffs and of the oil, as did the vendor of the wheat in Kimberly *v.* Patchin. If the 150 barrels of oil, of which the 100 barrels and the 4000 gallons were understood to be a part, were, like the wheat, all of the same quality, so that nothing but the quantity, without reference to quality, was to be taken from the larger amount, the extrinsic facts that the sale was at a profit of only two cents per gallon, and the risk of leakage during the summer months so largely exceeded the profits of the sale, it might be urged, with more plausibility than it now can, that the agreement of the defendants to deliver the barrels and oil when called for was like the agreement contained in the receipt in Kimberly *v.* Patchin to deliver the wheat to the order of the purchaser, and that the defendants should, under the circumstances, as was the vendor in that case, be regarded as the bailees of the plaintiffs. (But, in order to constitute an arrangement between the parties for a manual delivery of a parcel of property mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or, as the assignee of the purchaser did in Kimberly *v.* Patchin, maintain replevin for it. In this case the larger quantity, parcel of which was understood to be contracted to the plaintiffs, consisted of 150 barrels containing three different qualities of oil, but sixty-eight of which (forty-seven of the Buffalo and Erie oil and twenty-one barrels marked V. B.) corresponded with the sample by which the 100 barrels were sold. The residue, forty-six barrels of the Murray oil, was superior to the sample; and thirty-six, known as the Lemon oil, were inferior to the sample. The plaintiffs would not have the right to take the Murray or superior oil, and could not be compelled to take the Lemon or inferior oil. And if the sample was, as the witness at one time stated, a poor sample of the most inferior oil, then but thirty-six barrels of that description, containing less than 1500 gallons, could have been selected from the whole quantity, and hence the plaintiffs were without adequate means of redress, unless by action, for failing to deliver the quantity of oil sold conforming to the

sample.) The fact that the oil, which was the subject of the sale, was understood by the plaintiffs to be a parcel of a larger quantity, and that the sale was made at a profit of only two cents per gallon, while the risk of loss by leakage and evaporation was very large, are circumstances that would go far to prove that the defendants did not understand the legal import of the writing drawn and subscribed by them, or that they were overreached by the plaintiffs, who suggested their terms after, as one of them had testified, they refused to purchase, unless the defendants would guarantee them against leakage, which the defendants refused to do. But as no question was raised by the pleadings, or elsewhere, as to a reformation of the contract, we must regard it as expressing the intentions of the parties and give it the interpretation which, under the circumstances, its language plainly imports. The charge was more favorable to the defendants than a fair construction of the written contract warranted. The conversations out of which the defendants sought to establish an agreement between the parties that the defendants might set apart the 100 barrels of oil for the plaintiffs, as well as the conversations as to the guaranty against loss by leakage, were all prior to the reduction of their agreement to writing and should have been excluded from the consideration of the jury, leaving the writing as the only evidence of the agreement to be interpreted by the aid of extrinsic facts. No error was committed in the instructions to allow interest. The verdict was more favorable to the defendants than the charge warranted; of that, however, they cannot, upon this appeal, complain.

The order appealed from should be reversed.

All concur. Order reversed.

DARLINGTON, P. P., 77–80.

HAHN *v.* FREDERICKS.

Supreme Court of Michigan, 1874.

30 Mich. 223.

CAMPBELL, J. Fredericks sued the Hahns to recover the price of certain wood which was destroyed by fire before it had

been removed by the purchasers. The only question is whether the sale had been completed and the title passed before the fire.

The wood bargained for was two hundred cords of hard wood out of a pile of between three hundred and fifty and four hundred cords, in which was a small amount of soft wood, not piled by itself, but scattered through the other wood. It was all piled in tiers upon Portage Lake, the six rows nearest the lake containing by original measurement about two hundred and one cords, of which it was estimated there were eleven or twelve cords of soft wood. It is claimed that by the terms of purchase two hundred cords were to be taken from the first six tiers, and the seventh tier, to be removed by the purchasers after the opening of navigation, and to be measured by the purchasers. The price was fixed at three dollars and eighty cents per cord. The purchasers declined to take it at the original measurement.

In the spring, when there was some danger of the wood nearest the lake floating off, the evidence tends to show that Fredericks informed Hahns of the danger, and at their request procured two scowloads to be taken to Houghton to their dock, at their expense. It was measured when unloaded, and they took both hard and soft—the latter at a less price. The remainder was burned shortly after by an extensive fire that ran through that neighborhood in June, 1873.

The action was not brought for the breach of an executory bargain, but to recover the price of the wood upon a completed sale; and the jury found for plaintiff below on that theory. Both parties stand in equal equities, and the decision of the cause rests upon the question of law.

The facts upon which there is no variance were, *first*, that the price was fixed; *second*, the number of cords to be taken; *third*, that the purchasers were to remove it; *fourth*, that they were not to take the soft wood; *fifth*, that the hard wood was to be measured on the scow as removed from the piles; and, *sixth*, that until such measurement it could not be ascertained how much of the seventh pile would be needed.

The jury, in answer to a charge and question, found that plaintiff gave defendants below possession of the seven piles

nearest the lake; but there is nothing in the testimony that legally tends to show any such thing, any further than it might be inferred from the agreement that they would have a right to take the wood therefrom. No actual or symbolical possession is shown to have been given or taken. Nor is it clear that this would signify, in the absence of other important facts.

The principal question in the case seems to be whether the sale actually attached to any two hundred cords which could be identified before the fire.

It is not claimed, and there is nothing to warrant the notion, that the contract was intended to be severable, or to attach to any thing less than two hundred cords of hard wood, and of no other wood. There was no sale of the first six piles as they stood, or of the hard wood in the first six piles, independent of so much more as would fill up the measure.

Until an actual measurement, which was to be made when the hard wood was removed from the piles and as it was placed on the scows, it is evident that there could be no parcel identified to which a sale could attach as complete. It was a bargain for a parcel yet to be measured out of a larger parcel of various qualities, and of an extent not determined. The original measurement was, under this contract, of no importance.

We have found no authority which recognizes such a transaction as a completed sale. It was not a sale in gross of an entire parcel of wood, where the measurement was only necessary to ascertain the quantity, as in Adams Mining Co. *v.* Senter, 26 Mich. 73. Here the measurement was necessary to complete the identification and to determine what wood was to belong to the purchaser. Under such an arrangement it is well settled that no title passes to any portion of the property until it has been measured and thus identified and severed from the rest: Dunlap *v.* Berry, 4 Scam. 327; Courtright *v.* Leonard, 11 Iowa, 32; Young *v.* Austin, 6 Pick. 280; Merrill *v.* Hunnewell, 13 Id. 213; Mason *v.* Thompson, 18 Id. 305; Scudder *v.* Worster, 11 Cush. 573; Simmons *v.* Swift, 5 B. & C. 857, 11 Eng. Com. Law; Rugg *v.* Minett, 11 E. 210; Shepley *v.* Davis, 5 Taunt. 617, 1 Eng. Com. Law.

This case is distinguishable in some respects from any case heretofore decided by this Court, but rather by its facts than by the principles involved. The requisites for a completed sale have been somewhat considered in Whitcomb *v.* Whitney, 24 Mich. R. 486, and Adams Mining Co. *v.* Senter, 26 Id. 73, where title passed to property identified; in Lingham *v.* Eggleston, 27 Mich. 324, where it was held not to pass to property identified in gross, because not inspected and identified by quality and quantity, which were necessary to fix prices; and in Ortman *v.* Green, 26 Mich. R. 209, and First National Bank of Marquette *v.* Crowley, 24 Id. 492, where there was no sufficient identification, and therefore no title given.

There seems to be no foundation anywhere for declaring any thing to be a completed sale where the property is to be subsequently identified by separation and measurement out of a larger quantity, and cannot be known till so measured.

As the property was destroyed, it is simply a controversy as to who shall bear the loss. Several of the cases cited on the argument arose out of similar misfortunes, and it is clear it must fall on the actual owner, whose rights cannot be enlarged or diminished by the accident.

The judgment below must be reversed, with costs, and a new trial granted.

Where there is a sale of a specified quantity of grain from a mass, identical in kind and uniform in value, a separation of the quantity sold is not necessary to pass the title, where the intention of the parties that the title should pass by the contract of sale is clearly manifested; otherwise where the articles composing the mass are of different quantities and values, making a selection, and not merely a separation, necessary.

Hurff *v.* Hires, 40 N. J. Law, 581;
Bailey *v.* Loreg, 24 Kansas, 90;
Bailey *v.* Smith, 43 N. H. 141;
Galloway *v.* Week, 54 Wis. 604;
Randolph Iron Co. *v.* Elliott, 34 N. J. Law, 184.

Other acts to be performed by the Seller.

FOSTER *v.* ROPES.

Supreme Judicial Court of Massachusetts, 1872.

111 Mass. 10.

COLT, J. Under the instructions given, the jury were allowed to find that the sale of all the fish was completed, so as to pass the title to the defendant, on April 15th, the day when the contract of sale was entered into. This action is to recover the price of the whole, as for goods sold and delivered.

The defendant asked the Court to rule, upon all the evidence, that there was no sale at that time, and that, under a count for goods sold and delivered, the plaintiff could not recover for the fish which remained in Beverly after the 400 quintals were taken away by ~~him~~. This ruling was refused, and the jury were told, in substance, that the plaintiff could not recover for the fish in Beverly, if anything remained to be done to them by the plaintiff after the agreement of April 15th, unless they were satisfied that it was the intention and agreement of the parties that the sale should be complete and that the title should pass at that time. The point made by the defendant is, that the last part of this instruction was not supported by the evidence, and was calculated to prejudice his rights, even if correct as an abstract proposition, and as applicable to a different state of facts; and we are of opinion that the objection is well taken.

In the sale of personal property, the general rule of law is, that when, by the terms of the contract, the seller agrees to do any thing for the purpose of putting the property into a state in which the buyer is bound to accept it, or into a condition to be delivered, the title will remain in him until he has performed the agreement in this respect. In Rugg *v.* Minett, 11 East, 210, where a quantity of turpentine in casks was sold in lots at so much per hundred weight, it was held that the property had passed in those lots only in which the casks had been filled up as agreed, because as to them only had everything

been done by the sellers which lay upon them to put the goods in a deliverable state. And see also Acraman *v.* Morrice, 8 C. B. 449, 65 Eng. Com. Law; Morse *v.* Sherman, 106 Mass. 430.

This general rule will not prevail where, by the terms of the agreement, the title is to vest immediately in the buyer, notwithstanding something remains to be done to the goods by the seller after delivery. Thus in Riddle *v.* Varnum, 20 Pick. 280, it was held that the jury, where there was evidence of such intention, might infer a delivery to the buyer sufficient to vest the title, although something remained to be done by the seller; while the general doctrine above stated, in cases where there is no evidence of intention to complete the sale and pass the title, is fully affirmed. And in Turley *v.* Bates, 2 H. & C. 200, it was said that the Court must look to the intention, as drawn from the terms of the contract, in order to determine whether title to the property immediately passed: Young *v.* Matthews, L. R. 2 C. P. 127; Story on Sales, § 298 *a*.

In all cases, however, the intention of the parties as to the time when the title is to pass can be ascertained only from the terms of the agreement, as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made. The rights of the parties under the contract cannot be affected by their undisclosed purposes, or by their understanding of its legal effect.

In the case at bar, it was not in dispute at the trial that, by the contract of April 15th, the fish was to be put on flakes and further dried by the plaintiff, and afterwards weighed by him for the purpose of ascertaining the quantity and price. This was to be done for the purpose of fitting the goods for delivery. By the general rule, therefore, the property not actually taken away by the defendant remained in the plaintiff, unless there is evidence which would justify the jury in finding that by further agreement, notwithstanding this feature of the contract, the title was to pass immediately to the defendant. We can find no evidence of such agreement in the case stated. All that was said and done on April 15th is consistent with an

intention to leave the title in the plaintiff until the fish were fully cured, weighed, and delivered, according to the general rule of law; and there is nothing to vary the application of that rule. The letters subsequently written by the defendant do not seem to us to contain any thing which amounts to an admission of such an agreement; nor were the statements in the letters written to him by the plaintiff of such a character that his silence in regard to them can be construed into an implied admission.

The plaintiff further claimed, at the argument, that the bill of exceptions itself shows that all the evidence bearing on this point is not reported. But the record, after reciting the evidence and its bearing on the point, states that "upon all the evidence" the ruling asked for by the defendant was refused. This means that the purport of all the evidence in the case, bearing upon the point raised, is stated; and implies that nothing is omitted which the Judge deemed material.

The instructions given upon the question of the delivery of the fish which remained in Beverly, not being such as the defendant upon his request was entitled to, a new trial must be had unless the plaintiff remits, and takes judgment only for the 400 quintals, at the price agreed, which were actually taken by him. And in case of a new trial, as the alleged breach of warranty has been found for the plaintiff on the issues already tried, and no other question is made as to the defendant's liability for the goods actually removed, the trial must be confined to the single point raised by these exceptions.

Exceptions sustained.

Pike *v.* Vaughn, 39 Wis. 499;
Dixon *v.* Myers, 7 Gratt. 240;
Thompson *v.* Conover, 32 N. J. Law, 466;
Malone *v.* Minn. Stone Co., 36 Minn. 325;
Dyer *v.* Libby, 61 Maine, 45;
Gilbert *v.* N. Y. C. Ry., 4 Hun, 378;
Thompson *v.* Libby, 35 Minn. 443;
Hooper *v.* Chi. & N. W. Ry., 27 Wis. 81;
Martin *v.* Hurlbut, 9 Minn. 142;
Dodge *v.* Rogers, 9 Minn. 223;
Keeler *v.* Vandervere, 5 Lansing, 313;
Kein *v.* Tupper, 52 N. Y. 550;
Bagole *v.* McKinzie, 26 Mich. 470.

Acts to be performed by the Vendee.

FLETCHER *v.* LIVINGSTON.

Supreme Judicial Court of Massachusetts, 1891.

153 Mass. 388.

KNOWLTON, J. It is well settled that a contract like that relied on by the plaintiff does not immediately pass a title to property, and is not a sale or a contract for a sale of an interest in land, but an executory agreement for the sale of chattels, to take effect when the wood and timber are severed from the land, with a license to enter and cut the tress and remove them. Such a contract, if oral, is not within the Statute of Frauds, and its construction is the same as if it were in writing: Claflin *v.* Carpenter, 4 Met. 580; Giles *v.* Simonds, 15 Gray, 441; Drake *v.* Wells, 11 Allen, 141; Hill *v.* Hill, 113 Mass. 103, 105; United Society *v.* Brooks, 145 Id. 410. The subject was fully considered by Chief Justice BIGELOW, in Drake *v.* Wells, *ubi supra*, and was discussed in the earlier case of Giles *v.* Simonds, and it was held that a purchaser of standing wood and timber, after severing the trees from the land, has an irrevocable license to enter and remove them, but that before they are cut his license may at any time be revoked by the landowner, leaving him no remedy but an action to recover damages for the breach of the contract.

In the present case the declaration contains three counts. The first two are founded on the plaintiff's alleged ownership of the wood and timber as chattels. But she had no ownership so long as the trees remained attached to the realty, and her action cannot be maintained on either of these two counts. The third is for trespass *quare clausum*. The plaintiff by her contract acquired no interest in the land, and she was not in possession, and she cannot maintain an action of trespass. It does not appear that there was any breach of contract on the part of either of the defendants; but if there were, the plaintiff's remedy would be in another form of action.

The evidence excluded was immaterial. The plaintiff is not shown to have had any such interest in the realty as to give her

a right to pay the debts of the intestate for the purpose of preventing a sale of the land, or to enable her to call in question the administrator's conduct in advertising the sale. If no sale had been made, the heirs-at-law might lawfully have prevented her from entering upon the land.

Exceptions overruled.

Gamble *v.* Gates, 56 N. W. Rep. 855.

Acts to be performed by both parties.

PRESCOTT *v.* LOCKE.

Supreme Judicial Court of New Hampshire, 1871.

51 N. H. 94.

Statement of facts: The plaintiff sold defendant 100,000 walnut spokes, at $40 per thousand, which spokes were to be sawed by the plaintiff and delivered to the defendant in lots of ten thousand each. But before delivery plaintiff understood that he was to count the spokes delivered, and the defendant also understood that they were to count them before taking them from the mill. The first lot of ten or twelve thousand was selected by plaintiff and piled up, but not counted by the defendant. The plaintiff afterwards counted the selected pile and charged them to the defendant, but before they were counted or removed by the defendant they were burned with the mill.

FOSTER, J. The contract in this case was not for the plaintiff's labor, but was for the sale of merchandise to be subsequently manufactured.

It was not a contract to make spokes for the defendants; but it was an agreement that the defendants "would buy of the plaintiff what walnut spokes he should saw at his mill, at $40 per thousand" for the manufactured article.

Where the contract is for a chattel to be made and delivered it clearly is a contract for the sale of goods. In such case the party supplying the chattel cannot recover for his labor in

making it. If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for labor; but if the result of the contract is that the party has done work and labor which end in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. Per BLACKBURN, J., in Lee *v.* Griffin, 1 Ellis, Best & Smith, 272, 101 Eng. Com. Law.

Illustrations of the former proposition are: Where a carriage was ordered to be made, which would never, but for the order, have had an existence, but when made becomes the subject of sale. This principle has been applied even to a contract for the making of a coat, a statue, a set of artificial teeth, from materials provided by the maker, even where the peculiar skill of the maker is considered to be an important element in the consideration of the contract; for the value of the skill and labor, as compared with that of the material supplied, is not a criterion to determine what the contract is.

The true construction in this case is, that the contract was for the future sale of the spokes, when they should be in a state fit for delivery. The vendor, so long as he was sawing the timber and doing any other work preparing it for delivery in the form of spokes, was doing work for himself upon his own materials, and not for the defendants: Smith *v.* Surman, 9 B. & C. 561, 17 Eng. Com. Law.

Where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the vendor's bestowing labor on his own raw materials, that is a case of a contract for sale, within the Statute of Frauds: Garbutt *v.* Watson, 5 B. & A. 612; Smith *v.* Surman, before cited.

This was a contract for the purchase of such walnut spokes as the plaintiff should saw at his mill, not exceeding 100,000, to be delivered at the mill in lots of about 10,000 each, subject to the defendants' selection. It would be absurd to say that the defendants were to select the spokes before they had

become the subject of sale, prepared, by the previous work of the vendor, for the market. The plaintiff was to convert the timber into spokes, and, when so converted, the delivery and acceptance thereof were to occur. Until that time the contract would remain executory, and the title to the property would continue to be in the plaintiff. If the plaintiff had caused or permitted the spokes to be improperly or imperfectly manufactured, or to be made from other than good walnut timber, the defendants would not have been bound to accept or pay for them: Gorham *v.* Fisher, 30 Vt. 428.

Still the plaintiff would not necessarily lose the price of his labor. If the purchaser did not take the goods, others probably would. The labor bestowed on them was in the line of his business, and we may reasonably infer that his labor would have been bestowed in the production of such goods had the contract not been made: Cason *v.* Cheely, 6 Geo. 554.

It is very clearly settled by the more recent English and American cases, that it is not essential that the goods be capable of delivery at the time of making the contract, to bring it within the Statute of Frauds: Pitkin *v.* Noyes, 48 N. H. 298; Finney *v.* Apgar, 31 N. J. 266.

In Pitkin *v.* Noyes, it is said, "If, however, a person contract to make and deliver, at a future time, certain goods at prices then fixed, or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute;" and such is undoubtedly the law. In that case it was deemed proper to leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them, or whether it was substantially a sale of potatoes which he might raise himself, or procure by purchase or otherwise. The remark of the Court that "it is obvious that the plaintiffs might have an interest in stipulating that the defendant should himself raise the potatoes" preceded this disposition of the case, and the considerations suggesting that remark apparently controlled the disposition of it.

We understand the expression quoted from Pitkin *v.* Noyes

to mean, not precisely what is literally imported by it, but rather that it might be obvious that the plaintiffs might have an interest in stipulating that the potatoes should be raised upon the defendant's land, which might be regarded as peculiarly adapted to the raising of potatoes of a superior quality. And if that be the construction to be given to the remark, the consideration and the result were well enough.

But in the present case, it appears that it was no part of the essence of the contract that the plaintiff should, with his own hands and by the exercise of his own peculiar skill, manufacture these spokes, which the defendants were only bound to take after they had been culled out and selected by themselves.

This being a contract for the sale of chattels, we come, then, to the question whether there was such a delivery and acceptance of the spokes as transferred the property and title from the plaintiff to the defendants; for it is conceded that there was no part payment, earnest, or memorandum given, within the terms of the Statute of Frauds: Gen. Stats., ch. 201, sec. 14. And, therefore, the plaintiff cannot maintain assumpsit founded upon the contract, either for goods bargained and sold, or for goods sold and delivered, without showing such delivery and acceptance as shall be sufficient to take the case out of the operatian of the statute.

In his chapter entitled "At whose risk the thing sold is, during the intermediate time between the contract and the delivery," M. POTHIER discourses as follows: "Having established the principle that the thing sold is at the risk of the buyer as soon as the contract is perfected, it becomes necessary to inquire when the contract receives its perfection; and generally, the contract of sale is considered to be perfect as soon as the parties are agreed upon the price for which the thing is sold.

"This rule holds when the sale is of a specific thing, and is absolute (*pure et simple*): *si id, quod venierit appareat quid, quale, quantum sit, et pretium, et pure venit; perfecta est emptio.*

"If the sale is of things which consist *in quantitate*, and which are sold by weight, number, or measure—as, if one sells ten casks of the corn which is in a certain granary, ten thousand pounds of sugar, or one hundred carp, etc.—the sale is not per-

fect until the corn is measured, the sugar weighed, or the carp counted; for, until such time, *nondum apparet quid venierit.*

"It does not yet appear which is the corn, which is the sugar, or the carp, that makes the object of the sale, since that object can only be the corn that is to be measured, the sugar that is to be weighed, or the carp that are to be counted.

"It is true that before the measuring, weighing, or counting, and at the instant of the contract, the engagements which result from it exist. The buyer is then entitled to an action against the seller for a delivery of the thing, and the seller is entitled to an action against the buyer for a recovery of the price, upon offering to deliver it. [It will be borne in mind that the author, treating of the civil law, is not embarrassed by the consideration of the Statute of Frauds.] But, though the engagement of the seller subsists from that time, it may be truly said that it is not yet perfect, in this respect, that as yet it is only an object which is indeterminate, and which can be determined only by the measuring, weighing, or counting. For this reason, until the thing is measured, weighed, or counted, it does not become at the risk of the buyer; for the risk cannot fall but upon some determinate thing.

"This rule holds, not only when the sale is of a certain quantity of merchandise, to be taken from a magazine which contains a larger quantity, because, in such a case, as we have seen, until the measuring or weighing, that which is sold does not consist of any determinate body or thing upon which the risk may fall; it also holds when the sale is of the entire quantity contained in a magazine or granary, provided it is made at the rate of so much the pound, or so much the measure, etc.

"The sale in this case is not considered as perfect, and the thing sold is not at the risk of the buyer, until it is measured or weighed; for, until that time, *non apparet quantum venierit.* The price, being constituted only for each pound which shall be weighed, or for each cask which shall be measured, is not yet determined, before the weighing or measuring; and consequently the sale, before that time, is not so far perfect that the risk of the thing may fall upon the buyer. He ought not to be charged with it until after the goods are weighed or measured.

"But if the goods are not sold by weight or measure, but *per aversionem*, that is, in bulk, and for a single and only price —in such case the sale is perfect from the instant of the contract, and from that time these goods, the same as all others, are at the risk of the buyer."

The learned writer then proceeds to lay down certain rules for determining when the sale is considered as made *per aversionem*, and when by measure; and in the latter category he places the case where the price is expressly agreed upon for each measure; "whether the contract imports that it is of so many bushels of the grain in such a granary, at the rate of so much the bushel, or of a heap of grain, which is in such a granary, and which contains a thousand bushels, at the rate of so much a bushel."

The sale is considered to be made *per aversionem* "when it is made for a single price, not of so many measures of such a thing, but of such a thing which is declared to contain so many measures."

In such case the expression of the number has no other effect than to oblige the seller to make an allowance for the defect of quantity: Pothier Contr. of Sale, secs. 309, 310.

Tried by these tests, which we believe to be sound, it is quite clear that the contract before us was for a sale by measure or count, and not a sale *per aversionem;* and that the spokes were at the risk of the seller until the sale was perfected, which could not be so long as *non apparet quantum veniet.*

Now the question here is, Was this sale perfected, so as to pass the title to and impose the risk upon the purchaser?

Whatever may have been the intention or understanding of either party, or of both, it must be controlled by the Statute of Frauds. The statute is highly beneficial, indispensable indeed; and it must receive a favorable and liberal construction, *ut sit finis litium*, and to prevent perjury, and the mistakes and dangers resulting from evidence founded on imperfect memory.

By the terms of the statute, in the absence of part payment or a written memorandum, the buyer must "accept and actually receive" the property. It follows, therefore, that although, as a matter of fact, in a particular case, there may be

acceptance without delivery, or delivery and reception without acceptance, both conditions must be fulfilled before the title and risk can be transferred. And the acceptance must be clear and unequivocal: Nicholle *v.* Plume, 1 C. & P. 272, 12 Eng. Com. Law.

In this case, the culling of the spokes was not an acceptance of quantity, but only of quality—for then the quantity and price of the quantity was indeterminate; still there was a manual caption of the spokes by the buyers, at the place of delivery. Such delivery and reception was not enough to transfer the title and risk, without an acceptance of the property as a determined quantity; for such an acceptance depended upon a counting of the spokes.

But after the culling of the spokes by the buyers, the seller counted them, and charged them upon his book to the buyers. Whether this act of the seller can be regarded as a completion of the purchase, so as to transfer the title and risk to the defendants, may be a question to be governed by the understanding and intention of the parties. It must, of course, be a mutual understanding and intention; otherwise it is no element in the contract. It is manifest that the defendants are not to be bound and concluded as to quantity, and consequently as to price, unless they have expressly or impliedly agreed to be so bound.

Upon this subject the case finds that nothing was said about counting the spokes. The plaintiff understood that he was to count each lot selected by the defendants, and the defendants understood that they were to count each lot selected by them, before they took them from the mill; but it does not appear that both parties understood the defendants were to count the spokes. Still, if the defendants understood they were to count the spokes, it is manifest *they* understood that they were not to be bound by the plaintiff's count.

Could the plaintiff have understood the reverse of this? If so, would he not have rendered a bill of the quantity? The year preceding, the defendants had purchased of the plaintiff about 27,000 spokes, which were selected by the defendants and counted by both parties before they were removed from the mill. This fact would tend, in some degree, to show that the plaintiff, as well as the defendants, understood that the

latter were not bound to accept the count of the former as true.

The evidence of both defendants was admissible, to show their independant understanding in this particular—Graves *v.* Graves, 45 N. H. 323; Hale *v.* Taylor, Id. 406—provided such understanding does not come in conflict with legal principles or an express provision of law of superior and controlling effect: Blake *v.* White, 13 N. H. 272; Hale *v.* Taylor, before cited; Delano *v.* Goodwin, 48 N. H. 206; Cook *v.* Bennett, 51 N. H. 85.

This is a question of the construction of the agreement between the parties; and it is clear that the parties have not expressed, by the terms of the contract nor by their acts, their intention in a manner that leaves no room for doubt. The intention, therefore, must be collected from the whole agreement and the conduct of the parties, and it must be governed by the settled legal rules of construction, if any such rules are found to be applicable.

Mr. Blackburn (Sales *151–3) has discovered two rules, which are in terms nearly equivalent to those in which they are laid down by Pothier as the rule of the civil law.

The first is, "where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property."

The second is, that "where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods—where the price is to depend on the quantity or the quality of the goods—the performance of those things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted.

"Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring

the risk and gain of the thing sold:" Blackburn on Sales, *154.

To these Mr. Benjamin adds a third rule: "Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer:" Benjamin on Sales, 222.

The substance of these three rules seems to be tersely expressed by Mr. Justice STORY, thus: "To constitute delivery so that the property will pass, nothing must remain to be done concerning it *by either party*:" Barrett *v.* Goddard, 3 Mason, 111. Or thus, it is said: "The principle that runs through all the cases is, that when something remains to be done, as between buyer and seller, or for the purpose of ascertaning quantity or price, there is no delivery:" Rapelye *v.* Mackie, 6 Cow. 253; Fuller *v.* Bean, 34 N. H. 300; Warren *v.* Buckminster, 24 Id. 342; 2 Kent's Com. 496; Russell *v.* Carrington, 42 N. Y. 118; Davis *v.* Hill, 3 N. H. 382; Barnard *v.* Poor, 21 Pick. 378; Hanson *v.* Meyer, 6 East, 614.

Such fact will generally be conclusive that there was no acceptance so as to bind the parties: Brown on Frauds, sec. 317.

Where the defendant orally purchased of the plaintiff a quantity of tares by sample, and left them on the plaintiff's premises, saying that he had no immediate use for them, and requested that they might remain there till he wanted to sow them, which was agreed to—and afterward the tares were measured out by the agent of the plaintiff, and set apart in his granary, and ordered to be delivered to the defendant when he called, and the defendant afterward refused to take them, for which the action was brought—the Court of Queen's Bench nonsuited the plaintiff, holding that the defendant had not accepted the tares within the meaning of the statute. The decision seems to have gone upon the principle that the buyer would have the right, when the tares were tendered him, to reject them, as deficient in quantity or as not agreeing with the

sample, a right which he could not be presumed to have waived: Brown on Frauds, sec. 324.

If a sale is not complete, if anything remains to be done concerning the property by either party, a present right of property does not vest in the buyer. If any condition precedent, such as the ascertainment of the quantity, and thereby of the gross price, is not performed or waived, the sale is not complete: such is the rule of the common law.

This rule may be abrogated by express agreement of the parties, but the intention to change it so that the title shall pass at once must be unequivocal and distinct; otherwise the construction required by the principles of law must overrule the possible intention: Russel *v.* Carrington, 42 N. Y. 118.

Measures to ascertain quantity or price may be agreed on, but tacitly waived, or expressly postponed or dispensed with: Macomber *v.* Parker, 13 Pick. 183.

But the rule is laid down in Stone *v.* Peacock, 35 Me. 388, thus: "Where some act remains to be done in relation to the property which is the subject of sale, and there is no evidence to show any intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to a consummation of the contract, and until it is performed the property does not pass to the vendee: Ockington *v.* Richey, 41 N. H. 275.

In Fuller *v.* Bean, Mr. Justice BELL said: "There has been an inclination, in some cases, to regard a delivery as absolute when no condition is insisted on, and to consider such a delivery as a waiver of the condition. But this, we think, must depend on the intent of the parties, to be ascertained from all their language and conduct, and not from the single fact of delivery." "A mere assumption of ownership or control by the purchaser will not be sufficient evidence of a delivery, without proof of consent or acquiescence." And see Kelsea *v.* Haines, 41 N. H. 246.

In the present case, the spokes were to be taken by the defendants from the mill, and they were deposited in the place from which the defendants might remove them on the completion of the contract. But this fact alone would not constitute

a delivery in law. The defendants had no right to remove them before the quantity and the price regulated by the quantity was ascertained.

An important act, the act of counting the spokes, remained to be done, in which both parties had the right to participate, unless that right was waived by the defendants: Stone *v.* Peacock, before cited.

Is there any evidence competent to be submitted to a jury, tending to show any intention of the parties to make an absolute and complete sale, delivery, and acceptance, without a compliance of the prerequisite condition of ascertaining the number of the spokes?

Is there any evidence of any waiver by the defendants of their right to participate in the important act of counting the spokes?

It appears that "the defendants understood they were to count each lot selected by them, before they took them from the mill." Is there any evidence that the plaintiff had not the same understanding?

It appears that the result of the seller's enumeration was never communicated to the buyers till long after this suit was brought. If it had been understood by the parties that the buyers were not to participate in the counting, it would naturally be required that, before removal to the defendants' mill, a statement of that count should be rendered in order that the buyers might verify it. The plaintiff could not expect the defendants to pay for the spokes until they knew how many they were to pay for. Suppose the plaintiff had charged the defendants with 10,000 spokes, and the defendants, at the time of loading them for removal, had discovered that the actual number was but 9000, would they not have the right to reject the plaintiff's count, and revoke and repudiate the whole trade? If so, there was no prior irrevocable acceptance, to satisfy the terms of the statute. It can make no difference, in this respect, that the defendants might have a remedy against the plaintiff to compel him to make good a deficiency, ascertained after final acceptance. That is an independent consideration.

The remark of Lord ELLENBOROUGH, in Hanson *v.* Meyer, that "it certainly never was in the contemplation of the seller

to waive the act of weighing any part of the commodity contracted for," is equally applicable to the present case.

Suppose the defendants had removed the spokes at the time they selected them from the common mass, we apprehend the plaintiff would not have considered himself bound to accept as true the *ex parte* count of the defendants, made in his absence, without notice to him and an opportunity to verify the count before the removal of the property.

The fact is, the counting of the spokes was a material act, in which both parties were equally interested; and an *ex parte* adjudication, so to speak, of a matter so material as quantity and price, must almost inevitably have led to the very results which the Statute of Frauds was intended to prevent.

Suppose a creditor of the defendants had attached these spokes while lying in the plaintiff's mill-yard, before they were counted by the defendants, it would not seem to be very strange if the plaintiff should insist that the sale was not perfected; and, again, the mischief which the statute tends to avoid would have been precipitated. These illustrations show the necessity of a rule which shall require the provisions of the statute to be applied, except in a strong and unequivocal case of manifest waiver of their requirements. The postponement of the day of payment, originally provided for, furnishes no indication of the renunciation of all the other prerequisites of a valid transfer of title.

It would be quite natural that the defendants should count the spokes at the time of loading them, as was in fact done the previous year. There would thus be an opportunity for the defendants to verify or to correct the plaintiff's enumeration before the removal of the property to the defendants' factory, where the spokes would be without the plaintiff's control for any purpose.

The act of charging the spokes upon the plaintiff's book has no significance. In the well-known custom of merchants, such an act usually precedes the removal of the property.

Upon the whole, we fail to discover any evidence from which a jury would be at liberty to find a waiver of the defendants' right to insist upon a participation in a matter so material as the determination of the quantity of spokes; and we are of the

opinion that, under the application of the recognized principles of law, it is incumbent upon us to hold that the sale was not perfected, and that the title to the property remained in the plaintiff at the time of its destruction.

Under the provisions of the case, there must be judgment for the defendants.

Some act to be performed by a third party.

NOFSINGER *v.* RING.

Supreme Court of Missouri, 1879.

71 Mo. 149.

HOUGH, J. This was a suit to recover the difference between the contract price and market price at the time and place of delivery of sundry boxes of meat packed by the plaintiffs for the defendant, and delivered to him under a certain contract of sale, which meat the defendant failed and refused to accept. The defendant admitted the contract of sale and his refusal to accept the meat delivered, and alleged, as a reason for his refusal, that the meat tendered did not conform to the requirements of the contract. The contract, which was entered into on the 22d day of August, 1872, called for 500 boxes long boneless (long clear) middles, to average not less than fifty-two pounds each middle, and 500 boxes short boneless (short clear) middles, to average not less than forty-two pounds each middle, both lots at six and three-quarter cents per net pound of meat, delivery to be made at Kansas City, Mo., on board cars, at the option of the sellers, during the month of December, 1872, and to be paid for in cash on delivery; the above meat to be cured, cut, trimmed and packed according to the requirements of the New York standard for long and short boneless (clear) middles.

On the 20th day of December, 1872, the plaintiffs notified the defendant that they were ready to begin delivering the meat under their contract. Thereupon it was arranged between the parties that the meat should be inspected before it was delivered on board the cars, and one James McCullough, a professional inspector of meat, was employed by the defendant to

see that the meat offered by the plaintiff under his contract was properly cut, cured, trimmed, boxed and weighed. The plaintiffs were notified of his selection as inspector, and were directed to ship the middles to John H. Pool, New York City, whenever they received McCullough's certificate that they were according to contract. McCullough inspected the meat, gave the required certificate to the plaintiffs, and the meat was put upon the cars. Upon receiving from McCullough a description of the meat inspected by him and shipped by the plaintiffs, the defendant, Ring, wrote the plaintiffs, declining to accept the same, for the reason that it did not come up to the requirements of the contract. The plaintiffs retained the meat and sold it, and brought this action to recover the difference between the contract price and the market price at the time and place of delivery. The plaintiffs had judgment in the Circuit Court, which was reversed by the Court of Appeals.

The facts stated appeared in evidence at the trial, and the inspector also testified that the meat was according to contract. The defendant offered to prove that the meat was not according to contract, but this testimony was rejected by the Court. The cause was tried without the aid of a jury. At the instance of the plaintiffs, the Court gave the following declaration of law: If the Court, sitting as a jury, believe that the meat described in the contract offered in evidence and admitted in the pleadings was tendered to defendant by plaintiffs, and delivered on board the cars at Kansas City, within the time required by the contract, and that said meat, prior to said tender on said cars, had been inspected by the agent of defendant, and accepted by him, to be of the kind, quality and quantity called for in said contract; and when said meat was so tendered by plaintiffs, defendant failed and refused to receive and pay for the same, then the finding should be for the plaintiffs.

No question is made as to the measure of damages, and we therefore omit the instruction on that subject. The substance of the agreement between the parties was that the defendant would accept such meat, when delivered, as had been inspected by McCullough, and pronounced by him to conform to the requirements of the contract. There is no allegation, nor is there any evidence of collusion between the inspector and the plain-

tiffs; and, in the absence of any such collusion, the purchaser was as much bound to receive the meat as if he had inspected it in person. And there can be no question that, if Ring had himself inspected the meat and pronounced it according to contract, before it was packed and delivered, in the absence of any fraud or imposition on the part of the plaintiffs, he could not afterwards have refused to accept it on the ground that it did not come up to the contract. No fraud or unfairness on the part of the plaintiffs was attempted to be shown. We think the testimony offered was properly rejected, and that the declaration of law given by the Court was correct. The judgment of the Court of Appeals must, therefore, be reversed, and that of the Circuit Court affirmed.

2 Sch. on Per. Prop., § 286; Fuller *v.* Bean, 34 N. H. 290; Newlan *v.* Dunham, 60 Ill. 233; Dustan *v.* McAndrew, 44 N. Y. 72; Hutton *v.* Moore, 26 Ark. 382; Brogden *v.* Marriott, 2 Bing. (N. C.) 473, 29 Eng. Com. Law.

Sale "on Trial," or "Approval."

Hunt *v.* Wyman.

Supreme Judicial Court of Massachusetts, 1868.

100 Mass. 198.

Wells, J. Upon the facts stated in this case, there was a bailment and not a sale of the horse. The only contract, aside from the obligations implied by law, must be derived from the statement of the defendant that, if the plaintiff "would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it." This contract, it is true, is silent as to what was to take place if he should like it, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case

the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.

A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination, by the defendant, of his option to purchase. But it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence.

This action, being founded solely upon an alleged sale of the horse for an agreed price, cannot be maintained upon the evidence reported.

Exceptions overruled.

Mowbray *v.* Cady, 40 Iowa, 604; Aiken *v.* Hyde, 99 Mass. 183. Witherby *et al.* *v.* Sleeper, 101 Mass. 138. Hartford Sorgham Co. *v.* Bush, 43 Vt. 528.

Sale of Goods "to arrive."

ROGERS *v.* WOODRUFF.

Supreme Court of Ohio, 1873.

23 Ohio St. 632. 13 Rep. 276

STONE, J. The counter-claim of the defendant below is based upon an executory contract made October 13, 1862, by which, as defendant alleges, the plaintiffs sold and contracted to deliver to him by the 15th of November, then next ensuing, 3000 sacks of Liverpool salt. This allegation of the counter-claim is denied by the reply, and is not, in our judgment, supported by the contract given in evidence.

Effect is, of course, to be given to the words of the contract, "to arrive by the 15th of November," but the question is, What effect? They are, as we think, words of condition and

description only, and cannot be construed as a warranty that the salt shall arrive.

They serve to distinguish the salt which was the subject of the contract from the mass of salt of the same variety found in the market. The salt plaintiffs contracted to sell and defendants to buy, was not salt which plaintiffs may then have had on hand, or salt which had previously arrived. It was salt which was to arrive between the date of the contract and the 15th of November following. Whether it would arrive or not depended upon contingencies, not absolutely within the control of either party. If it arrived within the time limited, plaintiffs were impliedly bound to deliver it upon the contract. If it failed to arrive within that time no such obligation arose. There was, in that case, no salt which, under the terms of the contract, the plaintiffs were bound to deliver or the defendant to accept.

Cases have frequently arisen involving the construction of contracts, in their essential features, not to be distinguished from the contract here in question. It has uniformly been held that contracts of this description—for the sale of goods to arrive—are conditional, the words "to arrive," or other equivalent words, not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being, therefore, in the absence of other words showing a contrary intent, contingent upon its arrival: Alewyn *v.* Pryor, Ryan & Moody, 21 Eng. Com. Law, 406; Lovatt *v.* Hamilton, 5 M. & W. 639; Johnston *v.* Macdonald, 9 M. & W. 600; Shields *v.* Pettee, 2 Sand. 262. See, also, Russell *v.* Nicol, 3 Wend. 112; Benj. on Sales, 470; 1 Parsons on Cont., title "Of Sales to Arrive," and cases cited.

In the present case, it is not alleged that any of the salt referred to in the contract arrived, or came within the control of the plaintiffs prior to the 15th of November, nor is it claimed that its arrival was delayed by their agency. The defendant counts upon the contract as made, and bases his claim to recover solely upon the ground that the plaintiffs, by its terms, stipulated absolutely, and at all events, to deliver the salt within the time limited.

2. The testimony offered by defendant to show that by the

custom of merchants, the words "to arrive by the 15th of November," meant "deliverable on or before the 15th of November," tended materially to change the meaning and legal effect of the contract, and was clearly incompetent.

Judgment affirmed.

Neldon *v.* Smith, 36 N. J. Law, 148; Smith *v.* Pettee, 70 N. Y. 13; Benedict *v.* Field, 16 N. Y. 595; Johnson *v.* McDonald, 9 M. & W. 600.

Goods Sold and Shipped "C. O. D."

STATE OF VERMONT *v.* O'NEIL.

Supreme Court of Vermont, 1886.

58 Vt. 140. 56 Am. Rep. 557.

ROYCE, CH. J. The first and most important question presented by these cases is, whether or not the intoxicating liquors in question were (in the first two cases) in contemplation of law sold or furnished by the respondent in the county of Rutland and State of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing, or distribution contrary to the statute within said county and State. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the State of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offence against the laws of this State has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the county Court upon the question of the offence were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice for collection. The shipment was in each instance, which it is necessary here to consider, "C. O. D;" and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

Whether or not, and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the *intention* of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by MORTON, J., in Mason *v.* Thompson, 18 Pick. 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point; and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point, and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent: Benj. Sales, ss. 311, 319, note (*c*). When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession: Benj. Sales, s. 320, note (*d*). The Vermont cases to the above points are referred to in Roberts's Digest, 610 *et seq.*, and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They

delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely, payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was *intended* by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignees, and *if* he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention *not* to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory *contract* of sale in New York; but the completed *sale* was, or was to be, in this State.

The authorities upon the above points and principles are so numerous, and are so fully collated in the brief of the learned counsel for the State, and in the text and notes on 2 Benj. Sales

(4th Am. ed.), that we refrain from specific reference in support of the conclusions at which we have arrived. These are fully supported by the decision of the U. S. District Court of Illinois in People *v.* Shriver, 31 Alb. L. J. 163, a case involving precisely the same question. TREAT, J., says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield C. O. D., is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield, and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser—the sale would be a sale at Shawneetown—and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar the shipping of the liquor to Fairfield C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit the loss would have fallen on himself. He simply acted upon the request of

the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor."

II. It is insisted on the part of the claimant in the case of the State *v.* 68 Jugs, etc., that sec. 2 of No. 43 of the Acts of 1882, under which the liquors in that case were seized, is unconstitutional. Conceding the points contended for by the learned counsel for the claimant, that there is a well-recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens of this State, these propositions are nevertheless clearly subject to the qualification, that *when kept and intended for unlawful use*, such liquors fall at once under the ban of the law, and become subject to seizure and confiscation by such methods as are provided by law in conformity with the Constitution. That intoxicating liquors, when once branded with this unlawful intent on the part of the owner or possessor, become subject to confiscation by the government, and that the methods and means of their seizure and condemnation are within the police powers delegated to the Legislature by Art. 5, Part 1, of the Constitution, is too well settled in this State and elsewhere to require extended discussion: Spalding *v.* Preston, 21 Vt. 9; State *v.* Conlin, 27 Id. 318; Id. 325, 327; State *v.* Comstock, Id. 553; Gill *v.* Parker, 31 Id. 610; Pott. Dwarris, c. 14; Cooley Con. Lim. (4th ed.), 714, 727.

This section gives the officer the power to seize without warrant liquor found "under circumstances warranting the belief that it is intended for sale or distribution" contrary to the provisions of chap. 169 R. L. It does not purport to confer the power of search; nor does anything appear to show that the officer assumed to exercise such power in this case. It simply provides for the seizure, without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the Constitution, as an instrument intended by the owner or possessor for a use unlawful by express statute, and dangerous to the peace, health, and good morals of the community. That the article *in itself* may be innocuous, may be the subject of lawful ownership, or may even be susceptible of beneficial use,

can no more affect the question than could the fact that certain tools were susceptible of lawful and beneficial use in mechanics, save them from becoming subject to seizure and confiscation, if intended by their owner or possessor for use as the instruments for accomplishing a contemplated burglary; or the harmless character of the metal and its owner's right of property therein protect his ownership when fashioned and intended for passing as counterfeit coin. It cannot be doubted in this State, since the case of Spalding *v.* Preston, 21 Vt. 9, and has not been elsewhere, so far as we are aware, that articles or instrumentalities once impressed with the characteristics of *adaptation* and *intended use* for purposes prohibited by law and contrary to public peace, health, or morals, are subject to summary seizure under statutory or even general police regulations. That the liquors in question were intended for such use has been determined in this case as a question of fact by the tribunal designated by law, and that adjudication is conclusive.

The scope and application of Art. 5, Part 1, of the Constitution have been defined by this Court in the cases above referred to, and in *In re* Powers, 25 Vt. 265, which has ever since been regarded as conclusive against such application of that section of the bill of rights as is here contended for by the claimant. See Gill *v.* Parker, 31 Vt. 610; State *v.* Peterson, 41 Id. 504; State *v.* Intox. Liq., 55 Id. 82. In Massachusetts a statute practically identical with the one in question has been held not to contravene a similar constitutional provision: Jones *v.* Root, 6 Gray, 435; Mason *v.* Lothrop, 7 Id. 354. The decisions in Maine are to the same effect: State *v.* McCann, 59 Me. 383; State *v.* Howley, 65 Id. 100.

III. Concerning the claim that sec. 8 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the States, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express company, or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such article should be subject to seizure for the

protection of the community. It would certainly be a strange perversion of language to claim that if this express company were to hold in possession within this State clothing infected with the smallpox or yellow fever, or tools with which it was intended to commit a burglary, the State government should be powerless to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought in the ordinary course of business from another State. If the express company has in possession within the State liquor, *with intent to make unlawful use or disposition of it*, then the right to seize it and prevent such unlawful use attaches. If it were competent for persons or companies to become superior to State laws and police regulations, and to override and defy them under the shield of the Federal Constitution simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the States to regulate the traffic in intoxicating liquors has been settled by the United States Supreme Court in the License Cases, 5 How. 577.

IV. Proof of the former conviction in the cases of State *v.* O'Neil was properly admitted, notwithstanding the conviction appeared to have been more than three years before the trial. No provision of the statute requires that the former conviction must have been within three years, and we have no authority to add such a provision to the law, as it is plainly and unambiguously framed by the Legislature. The reason for the limitation of prosecutions for the offences charged in these cases to a period within three years from the time of commission, as for all similar limitations, is that a person should not be called upon to answer to a legal accusation after such a long time has elapsed as would, in the estimation of the law, make it difficult or impossible, by reason of the death or removal of witnesses, the loss or destruction of evidence, or the various embarrassments likely to arise from a considerable lapse of time, for him to establish his innocence. This reason has no application to a case where the only proof that can be used on the one side or the other is matter of record. We should therefore have no justification, even if we deemed it within the scope of our

power and duty, for making application of a rule of limitation by analogy in these cases.

V. The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offence with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offences. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offence, the constitutional question might be urged; but here the unreasonableness is only the number of offences which the respondent has committed.

The inevitable deduction from what has been said under the first point is, that the respondent, O'Neil, by what he did in respect of the transactions in question, made the express company his agent; and as what was done by such agent in the execution of the authority and instructions directly given by him constituted offences against the statute, O'Neil must be held responsible. That he was innocent of any purpose or intent to break the law, and was unaware that what he did was contrary to law, cannot avail him in defence: State *v.* Comings, 28 Vt. 508.

The result is that in the cases of the State *v.* O'Neil, numbers 27 and 28, the respondent takes nothing by his exceptions; and in the cases of the State *v.* Intoxicating Liquor, National Express Company, claimant, numbers 25 and 26, the judgments are affirmed.

Commonwealth *v.* Flemming, 130 Pa. 138 (18 Atl. 623).

76 Cal. 212

Goods sold by Sample.

MARRIMAN *v.* CHAPMAN.

Supreme Court of Errors, Connecticut, 1864.

32 Conn. 146.

HINMAN, C. J. This suit was for the price of some barrels of apples claimed to have been sold and delivered. The sale was by sample, and the defendant, on their being delivered to him, objected to receiving them on the ground that they did not correspond with the sample, and tendered them back to the plaintiff, and the question before the Court was whether they did in fact correspond with the sample. The plaintiff claimed that in consequence of the delivery, so that the apples came into the defendant's possession, the burden of proof was upon the latter to show that they did not correspond with the sample; but the Court decided that, as they were not accepted, and were tendered back to the plaintiff in due season on discovering their inferior quality, it was for the plaintiff to prove that the quality was not inferior in order to enable him to recover. We have no doubt of the correctness of this decision. Where there is an executory contract for the sale of goods warranted to be of a particular quality or description, they must conform to the warranty, or the vendee is not bound to receive or accept them: Wright *v.* Barnes, 14 Conn. 518. And a sale by sample is held to imply a warranty that the bulk of the article corresponds in quality with the article exhibited: Bradford *v.* Manly, 13 Mass. 139; Waring *v.* Mason, 18 Wend. 425. If it does not correspond with the warranty when delivered the vendee is not merely justified in not receiving it, but he may receive it for the purpose of examination and if found not to be of the quality or description warranted, or, what is the same thing, not to correspond with the sample, he may return it to the vendor, the examination and return being within a reasonable time: Lord TENTERDEN, C. J., in Street *v.* Blay, 2 Barn. & Adol. 456, 22 Eng. Com. Law.

The executory contract for the sale and delivery of the goods

does not become executed, so as to lay the foundation for an indebitatus assumpsit, until goods answering the description of the contract, that is, in this case corresponding substantially with the sample, have been delivered, or there has been a complete acceptance of them by the vendee. The error of the plaintiff's counsel in this case consists in treating the delivery of the goods at the defendant's place of business as a complete delivery, and tantamount to an acceptance of them by the defendant. If the defendant had received them as in execution of the contract, or had kept them for an unreasonable time before returning or tendering them back, the plaintiff's claim would be correct. But while the contract remained executory it would be a strange perversion of justice to bind him to accept and pay for that which he had never purchased, and he clearly did not purchase that which did not answer in quality to the description of his contract.

The condition that the property may be returned, if it does not answer the description contemplated and agreed upon, is always implied, if there has been no acceptance of it by the vendee. If the action had been brought upon the executory contract for not accepting and paying for the goods, it is apparent that in order to prove his whole case the plaintiff must have shown that the goods corresponded with the sample, since otherwise it would not appear that his part of the contract had been performed, while on an executed contract it is only necessary for the plaintiff to prove its execution, and it is then for the defendant to show that the goods were inferior to the quality stipulated for, in order to reduce the price to be paid for them. Here the plaintiff sues as upon an executed contract. He may do this if he can show that in point of fact it has been so far executed as to create a debt against the defendant for which indebitatus assumpsit will lie, and he can do this in one of two ways: he may show a delivery of the goods and an acceptance of them by the defendant, either expressly, or by retaining them for an unreasonable time or an appropriation of them to his own use, or he may show an execution of the contract on his part by the delivery of goods corresponding in quality with the stipulations of the contract. This, of course, in a case like the one under consideration, throws the burden

of proving the quality upon the plaintiff. There is nothing in the case of Dorr *v.* Fisher, 1 Cush. 171, in conflict with the views here expressed, but, on the contrary, we are sustained by that decision. In that case the goods had been accepted in fact and appropriated to the defendant's use, and the breach of warranty was only set up for the purpose of reducing the damages, and in such a case there is no doubt that the burden of proof is upon the party who sets up the breach of warranty.

For these reasons we are of opinion that there is no error in the judgment complained of, and a new trial is not advised.

Day *v.* Raguet, 14 Minn. 273; Williams *v.* Spafford, 8 Pick. 250; Salisbury *v.* Stainer, 19 Wend. 159.

3.

CONDITIONAL SALE.

a.

Rights of Parties.

DAY *v.* BASSETT.

Supreme Judicial Court of Massachusetts, 1869.

102 Mass. 445.

CHAPMAN, C. J. It appears that Holt, being the owner of the shaft which is the subject of controversy, sold and delivered it to Henry for $31.20, receiving $10 as part payment; that it was agreed that it should remain the property of Holt till it was paid for; and that Henry took it and put it into the mill in his occupation, and connected it with the machinery, and it continued to be used with the machinery. It is implied by the statement of the case that this was with the consent of Holt. But as no time of payment appears to have been fixed, it is implied that payment was to be made on demand. Henry would have the right under these circumstances to retain and use the shaft till he made default. Until such default Holt could not reclaim the property; and upon a tender of the balance due, Henry's title would become absolute. But before

making the tender he sold the machinery in the mill to the plaintiff, who entered and took possession of the property, including the shaft. He did not remove the shaft, but continued to use it as Henry had done. It is contended that this sale forfeited Henry's right to complete his title by making payment of the balance. But this cannot be so consistently with the principles applicable to such contracts. As in the case of Vincent *v.* Cornell, 13 Pick. 294, it was a conditional sale to him, liable to be defeated by non-performance of the condition. He had a right to dispose of the property, with his right therein, such as it was, to the defendant. He had a possession and a right of possession, and a right to use the property where it was until default of payment.

When Henry perfected his own title by a tender of the balance due, the plaintiff's title became perfected thereby, and the defendants afterwards took the shaft away without right. These principles are in accordance with the case of Coggill *v.* Hartford and New Haven Railroad Co., 3 Gray, 548. In that case the bargainees had neglected to pay for the property by note, as they had agreed to do, and the vendor's right to repossess himself of the property was put upon the ground that the condition had not been fulfilled. See, also, Reed v. Upton, 10 Pick. 522; Whipple *v.* Gilpatrick, 19 Maine, 427.

Exceptions sustained.

DARLINGTON, P. P., 88; Various Conditions.
Payment—M. C. Ry. *v.* Phillips, 60 Ill. 190;
Security—Thorpe Bros. & Co. *v.* Fowler, 57 Iowa, 541;
Whitney *v.* Eaton *et al.*, 15 Gray, 225;
Russell *v.* Minor, 22 Wendell, 659.

Attaching Creditors.

COLE *v.* BERRY.

Supreme Court of New Jersey, 1880.

42 N. J. Law, 308. 36 AR. 511

DEPUE, J. Cole sued Berry, in trespass, for seizing and selling a sewing machine. Berry, as one of the constables of

the county of Hunterdon, seized and sold the machine under and by virtue of a writ of attachment issued out of the justice's Court, against one Gustave Wetzel. Cole was the owner of the machine. He entered into a contract for the sale of it to Wetzel, the terms of which appear in the following agreement in writing:—

"ANNANDALE, June 26, 1876.

"Whereas, the subscriber have this day purchased of Josiah Cole one Domestic sewing machine, for the sum of fifty-five dollars, for which I have given fifteen dollars in cash, and my note for forty dollars, payable in instalments of five dollars a month, and I have allowed him to take the machine in his possession: Now, it is agreed that the said machine is to be and remain the property of the said Cole, and be subject to his control, until the same is actually paid for in cash.

"GUSTAVE WETZEL."

Cole delivered the machine to Wetzel, under this arrangement, and it was in the possession of the latter when it was levied on by the defendant. For the $15, which, by the agreement, was payable in cash, Wetzel gave a due bill, payable in eight days. For the balance of the contract price, Wetzel gave a note, payable according to the terms of the agreement. Neither the due bill nor the note has been paid. On the trial, the Court gave judgment for the defendant, on the ground that the written agreement was fraudulent and void, and that the plaintiff had no title to the machine when it was attached.

The agreement is inartistically drawn. It leaves it in some doubt whether, in legal import, the paper is to be considered as a "mortgage, or conveyance intended to operate as a mortgage," within the thirty-ninth section of the Act concerning mortgages (Rev., p. 709), or as containing the terms of a contract of sale between the parties. The Court below evidently regarded it in the latter aspect, for there is no mention in the case of the filing or non-filing of the instrument as a chattel mortgage. Taken in connection with the other evidence, the transaction is susceptible of such an interpretation, and I will adopt that construction for present purposes. I do so the more readily as either construction presents for examination the

soundness of the reason on which the judgment of the Court was based.

The legal proposition which entered into the judgment below is either that a contract for the sale of a chattel, followed by delivery to the vendee, passes title to the vendee, although it be one of the terms of the contract that the title shall not pass until the contract price be paid, or that such an agreement is, *per se*, fraudulent and void, as against creditors of the purchaser.

Neither of the foregoing propositions contains a correct exposition of the law. No rule of law is better settled than that, in the sale of chattels, property will pass or not, according to the intention of parties, as expressed in the contract of sale. "It is a general rule that when a man hath a thing, he may condition with it as he will:" Shep. Touch. 118. Mr. Benjamin states the general rule in this language: "Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer:" Benj. on Sales, 222.

Payment of the contract price is one of the most usual conditions on which the transfer of title depends. It is generally a condition to be performed simultaneously with delivery. If such be the contract, a waiver of the condition may be presumed from an unconditional delivery, without exacting payment, and in the absence of explanatory proof, the property will vest in the purchaser: 2 Kent, 496; Smith *v.* Lynes, 1 Seld. 41; Carleton *v.* Sumner, 4 Pick. 516; Smith *v.* Dennie, 6 Id. 262–266; Farlow *v.* Ellis, 15 Gray, 229. But where the delivery is conditional, as where the parties have stipulated that, notwithstanding delivery, the title shall not pass until the contract price be paid, property in the chattel will not pass to the vendee until payment be made. The vendor's title is not divested by a conditional delivery, if the terms of sale, with respect to payment, be not complied with: D'Wolf *v.* Babbett, 4 Mason, 289; Copland *v.* Bosquet, 4 Wash. C. C. 588; The Oriole, 1 Sprague, 31; Parsons on Contracts, 537.

In Ballard *v.* Burget, 40 N. Y. 314, GROVER, J., styles such a contract an executory agreement that the title shall pass on the happening of the stipulated event—the payment of the price. Mr. Story distinguishes it from a purely executory contract in this particular: that an executory contract is absolutely to sell at a future time, and a conditional contract is conditionally to sell. In the one case, he says the performance of the contract is suspended, and transferred to a future time; in the other, the very existence and performance of the contract depends upon a contingency: Story on Contracts, § 246.

As between the immediate parties to the contract, the principle above mentioned is inflexibly adhered to. There is some diversity of views with respect to its application as against creditors of the vendee and *bona fide* purchasers from him, for full value. In some of the Courts, it has been held that conditions in contracts of sale, that title shall not pass until payment of the purchase-money, are not good as against those claiming under the vendee as creditors or purchasers, when possession is delivered to the vendee. Another class of cases hold that, while conditions of this character are valid as against the creditors of the vendee, they are invalid as against *bona fide* purchasers from him. These decisions are the outcome of the doctrine that upon a sale of chattels, possession inconsistent with the actual title is, *per se*, fraudulent and void, as against creditors and *bona fide* purchasers. This doctrine is not in force in this State. Our Courts have held that a possession which is consistent with the agreement between the parties is not, of itself, actually or constructively fraudulent: Runyon *v.* Groshon, 1 Beas. 86; Broadway Bank *v.* McElrath, 2 Id. 24; Miller ads. Pancoast, 5 Dutcher, 250. A vendor who delivers possession of chattels to his vendee, under an executory contract that the title shall pass on payment of the contract price, may forfeit his property by conduct which the law regards as fraudulent, as where, in addition to possession, he clothes the vendee with an apparent title, on the faith of which third persons are induced to act in giving credit or in becoming purchasers, or where he knowingly permits the vendee to exercise acts of ownership over

the property, inconsistent with only a qualified right of possession, to the injury of others. In such cases, the question of fraud becomes one of fact, to be decided by a jury upon the circumstances of the particular case. But where the case presents no other features than that the vendor has entered into a contract of sale on credit, and has delivered the goods to the vendee, upon an agreement that they shall remain the property of the vendor until payment of the purchase-money, the property in the goods remains in the vendor until payment be made, without being subject to execution at the suit of the creditors of the vendee, and the title of the vendor is preferred to that of purchasers from the vendee.

Possession by the vendee, under a contract of sale containing a stipulation, whether verbal or in writing, that the property shall not pass until payment of the contract price, is not fraudulent, and creditors of the vendee cannot seize the property under execution until the condition be performed: Bump on Fraud. Con. 150. In Herring *v.* Hoppock, 15 N. Y. 409, the plaintiff delivered a safe to Brooks & Hopkins, on a contract of sale as follows:—

"New York, February 6, 1852.

"Received from Silas C. Herring, one Salamander patent safe, No. 4910, delivered to us this day, under a bargain for the sale thereof, and for which we have given our note at six months, for $235. And it is expressly understood that Herring neither parts with, nor do we acquire any title to said safe, until said note is fully paid; and in case of default in the payment thereof, at maturity, said Herring is hereby authorized to enter our premises and take and remove said safe, and collect all reasonable charges for the use of the same.

"Brooks & Hopkins."

Brooks & Hopkins failed to pay the note mentioned in the agreement, and on the 9th of August, 1852, it was protested for non-payment. On the 26th of June, 1852, the safe was seized and sold by the sheriff, under executions against Brooks & Hopkins. In an action for wrongfully taking and converting the safe, the Court held that, under the contract in question, the property of the vendor was not divested, and that

he could recover its value of the execution-creditor, by whose direction the safe was sold, under an execution against the vendee. In Cole *v.* Mann, 3 N. Y. Sup. Ct. 380, the plaintiffs, who were dealers in pianos, shipped a piano to one Jenne, under an agreement that the piano should remain the property of the plaintiffs till paid for, and that if Jenne made sale of the piano, he should remit proceeds sufficient to pay a note he gave for the contract price. It was held as against an execution-creditor of the consignee, that title did not pass from the consignor, and that the property was not liable to levy and sale under an execution against the consignee.

As to creditors, a sale and delivery of a chattel, on condition that the title shall remain in the vendor until the price be paid, vests no title in the vendee before payment, which shall be subject to levy under an execution against the vendee: Marston *v.* Baldwin, 17 Mass. 606; Blanchard *v.* Child, 7 Gray, 155; Porter *v.* Pettengill, 12 N. H. 299; McFarland *v.* Farmer, 42 Id. 386; Gaylor *v.* Dyer, 5 Cranch C. C. 461; Strong *v.* Taylor, 2 Hill, 326; Forbes *v.* Marsh, 15 Conn. 384–395.

With regard to purchases from a vendee in possession under a contract of sale, a distinction is observed between the vendor's right to rescind the sale for fraud, and his right to resume possession where goods have been delivered under a conditional contract of sale. Where the sale is upon credit, but is absolute in terms, and the vendor intends to transfer property as well as possession, the property passes to the vendee, by the contract of sale, leaving in the vendor only a right of rescission for fraud. He may, in that case, re-possess himself of the property, notwithstanding a levy upon it, under an execution against the vendee: Williamson *v.* N. J. S. R. R. Co., 2 Stew. 311. The title passing to the vendee, by the contract, and being vested in him until the sale be disaffirmed, an innocent purchaser for value may, before disaffirmance of the sale, acquire an indefeasible title, though the sale be voidable as between the original parties: White *v.* Garden, 10 C. B. 919; Stevenson *v.* Newnham, 13 Id. 285–302; Mowrey *v.* Walsh, 8 Cow. 238; Root *v.* French, 13 Wend. 570; Hoffman *v.* Noble, 6 Metc. 68. But where the vendee is in

possession under a conditional contract of sale, he has no property to convey to a purchaser, and the vendor's title never having been divested, he may reclaim the property, if the condition be not performed, even as against a purchaser for value in good faith. In Ballard *v.* Burgett, 40 N. Y. 315, the contest was between the vendor and a *bona fide* purchaser of the property from the vendee. The Court held that, under a conditional contract to purchase, one of the terms of which was that the chattel which was delivered to the vendee should remain the property of the vendor until the contract price was paid, the title remained in the vendor against a *bona fide* purchaser, who bought of the vendee in good faith, and paid full value, without notice of the rights of the vendor. Decisions of other Courts to which we are accustomed to look for correct expositions of the common law, are to the same effect: Dresser Mfg. Co. *v.* Waterston, 3 Metc. 9; Coggill *v.* Hartford & New Haven R. R. Co., 3 Gray, 545; Sargent *v.* Metcalf, 5 Id. 306; Burbank *v.* Crooker, 7 Id. 158; Deshon *v.* Bigelow, 8 Id. 159; Hirschorn *v.* Canney, 98 Mass. 149; Zuchtman *v.* Roberts, 109 Id. 53; Benner *v.* Puffer, 114 Id. 376; D'Wolf *v.* Babbett, 4 Mason, 289; Copland *v.* Bosquet, 4 Wash. C. C. 508; Tibbetts *v.* Towle, 12 Me. 341; Haven *v.* Emery, 33 N. H. 66; Kimball *v.* Jackman, 42 Id. 242.

The cases cited above as holding the doctrine that, on a conditional sale, property continues in the vendor as against creditors of and purchasers from the vendee, though possession is delivered to the latter, are, it seems to me, founded on correct principles. In Pennsylvania, a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid, it being held that, in the former instance, property does not pass as in favor of creditors and purchasers of the bailee, but that, in the latter instance, delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to *bona fide* purchasers: Chamberlain *v.* Smith, 44 Pa. 431; Rose *v.* Story, 1 Id. 190; Marsh *v.* Mathiot, 14 S. & R. 214; Haak *v.* Linderman, 64 Pa. 499. This distinction is dis-

credited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent *per se*. Besides the cases already cited on that subject, numerous decisions of like import are referred to by Mr. Perkins, in his edition of Benjamin on Sales, § 320, note. From the hypothesis that, *inter partes*, no title passes to the vendee, under a contract of sale which is conditional as to the transfer of title, until the condition is performed, the only deduction that can rationally be made is that, in such a transaction, the title of the vendor must also prevail over the rights of the creditors of a purchaser from the vendee, whose rights cannot rise higher than the source from which they are derived, unless they can show a title superior to that of the vendee whom they represent, arising from some conduct of the vendor which the law denominates as fraudulent. Possession is evidence of title, but is not title, and in this State possession by a party, not in accordance with the actual state of the title, is not, *per se*, fraudulent.

The judgment should be reversed.

DARLINGTON, P. P., 80; Call *v.* Seymour, 40 Ohio State, 670;

Contra—Murch *v.* Wright, 46 Ill. 487.

Bona Fide Purchasers.

COGGILL *et al. v.* HARTFORD, ETC., RY.

Supreme Judicial Court of Massachusetts, 1854.

3 Gray, 545.

BIGELOW, J. It has long been the settled rule of law in this Commonwealth, that a sale and delivery of goods, on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors, claiming to hold them under attachments:

Hussey *v.* Thornton, 4 Mass. 405; Marston *v.* Baldwin, 17 Id. 606; Barrett *v.* Pritchard, 2 Pick. 512; Whitwell *v.* Vincent, 5 Id. 449; Hill *v.* Freeman, 3 Cush. 257.

In the case at bar, the jury have found that the original sale and delivery by the plaintiffs were conditional. But the defendants claim to hold the goods in controversy, as bailees of a *bona fide* purchaser from the original vendee, on the ground that, having purchased them in good faith, the rule above stated is not applicable, and that a valid title to the property is vested in such purchaser. This position is supposed to be supported by a *dictum* of Chief Justice PARSONS, in Hussey *v.* Thornton, by which it is implied that in such cases the vendor cannot reclaim goods in the possession of *bona fide* purchasers from his vendee. But the authority of this *dictum*, so far as it ever had any, was entirely overthrown in Ayer *v.* Bartlett, 6 Pick. 78, where Chief Justice PARKER said that it could not be sustained as a general proposition. Some of the elementary writers have stated such a doctrine in unqualified terms; but the authorities cited by them in its support do not sustain the text: Hilliard on Sales, §§ 95 *et seq.*; Story on Sales, § 313. Chancellor KENT, after stating the rule as to vendees and attaching creditors, in conformity with the decisions above cited, adds, that as to *bona fide* purchasers, the rule might be otherwise: 2 Kent Com. (6th ed.) 498. In Hill *v.* Freeman, 3 Cush. 259, the most recent case on the subject in our own reports, the Court say, that the right of the vendor to reclaim property in such cases, in the hands of *bona fide* purchasers, is an open question.

Looking, then, at this case, as we think we may, as one not depending on authority, but to be determined on just and sound principles, it is difficult to see any good and satisfactory reason for the distinction, which is attempted to be made, between the rights of the vendee and his creditors to goods sold and delivered on condition, and those of *bona fide* purchasers. All the cases turn on the principle, that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee, in such cases, acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take

effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy. The cases above cited expressly recognize them as legal and valid contracts between the vendor, on the one hand, and the vendee and his creditors, on the other. If valid to this extent, it necessarily follows that they are so for all purposes. If the property does not pass out of the vendor for one purpose, it certainly does not for another. If it remains in him at all, it is because such is the agreement of the parties, and it cannot be divested by any act of the vendee until the contract is fulfilled. A *bona fide* purchaser, as well as an attaching creditor, must acquire his title through the vendee. If the latter has no title, he can communicate none. The purchaser and the attaching creditor are, in this respect, upon the same footing. No equities can intervene to give the former a better right as against the original vendor than the latter; they are *in æquali jure*. Neither of them has a legal title to hold the property.

A mere possession by the vendee carries with it no right or authority to transfer the title. That continues in the vendor until the conditions of sale and delivery are complied with by the vendee, or are waived by the vendor. And this constitutes the precise distinction between a sale and delivery of goods on condition, and a sale procured by fraud or false representations on the part of the vendee. In the latter case, the property passes by the sale and delivery, because such was the agreement and intent of the parties. Therefore, the vendee, having the property as well as the possession of the goods, can pass a good title to a purchaser, who takes the goods in good faith and without notice of the fraud. But the vendor can reclaim the goods by rescinding the contract and avoiding the sale, so long

as they remain in the hands of the vendee, or of any one who has taken them with notice of the fraud, or without paying a valuable consideration for them. In such case, the title to the goods is in the vendee, though defeasible at the option of the vendor, because the vendee, or those claiming under him with knowledge of the fraud, cannot honestly or legally hold the property as against him. But in the case of a conditional sale and delivery, the title does not pass from the vendor until the condition is fulfilled. The vendee obtains no right, under such sale, to dispose of the property, but only to hold it until the terms of the contract are complied with: White *v.* Garden, 10 C. B. 919, 70 Eng. Com. Law.

It is urged, and this we suppose to be the main argument on which the contrary doctrine is founded, that as possession of personal property is *prima facie* evidence of title, it would furnish fraudulent parties with the means of defrauding honest purchasers, to intrust them with the apparent ownership of property, while the real title is allowed to remain in a third party, who can reclaim it at pleasure. If a vendor, by collusion with his vendee, entered into the contract, and annexed the conditions, for the purpose of enabling the latter to obtain a false credit, or to impose on innocent persons, by means of the property placed in his possession, the argument would be decisive. In such case, the vendor, being a party to a fraud, would be estopped to set up any title to the property; and creditors, as well as innocent purchasers of the vendee, might well claim to hold it, on the ground that it was placed in his possession for a fraudulent purpose. But when the contract of sale is entered into in good faith, for the purpose of enabling the vendor to realize his purchase-money, or obtain security for it, in conformity with the original terms of the bargain, the argument *ab inconvenienti* is without any foundation in principle or authority. The general rule of the common law has always been that a man who has no authority to sell cannot, by making a sale, transfer the property to another: Chit. Con. (8th Amer. ed.) 342. Except in cases of sales in market overt, which do not exist in this Commonwealth, possession, of itself, confers no authority to sell. A lessee of chattels or a bailee for a special purpose can pass no title to a vendee, without

authority from the lessor or bailor; and yet the property is intrusted to their possession, as apparent owners, in the same manner as to a vendee under a conditional sale. Besides, there is no good reason or equity in placing the burden of a fraudulent sale by a vendee, in violation of the condition on which he received the property, upon a *bona fida* vendor, rather than upon a *bona fide* purchaser. On the contrary, if either is to lose by his fraudulent act, it should be the latter, who has dealt with a party having no authority, instead of the former, who relies upon a valid subsisting contract as the foundation of his claim. It is the duty of the purchaser to inquire, and see that his vendor has a good title to the property which he undertakes to sell. These views are supported by the authorities: Long on Sales (2d Amer. ed.) 189, and cases cited; Copland *v.* Bosquet, 4 Wash. C. C. 588; D'Wolf *v.* Babbett, 4 Mason, 294; Luey *v.* Bundy, 9 N. H. 298; Porter *v.* Pettengill, 12 N. H. 299; Herring *v.* Willard, 2 Sandf. 418; Barrett *v.* Pritchard, 2 Pick. 512; Dresser Manuf. Co. *v.* Waterston, 3 Met. 9.

The instructions given to the jury, in the present case, were in conformity with these principles; and were carefully guarded, so as to prevent the plaintiffs from recovering if they had been guilty of laches in reclaiming their property, or had in any way waived the conditions on which the property in controversy was sold and delivered to the original vendee.

Exceptions overruled.

DARLINGTON, P. P., 80;
2 Sch. Per. Prop., § 300;
Ballard *v.* Burgett, 40 N. Y. 314;
Harkness *v.* Russell & Co., 118 U. S. 663;
Bayliss *v.* Pearson, 15 Iowa, 279;
Shireman *v.* Jackson, 14 Ind. 459;
Brown *v.* Fitch, 43 Conn. 512.
Hotchkiss *v.* Hunt, 49 Maine, 213;
Fifield *v.* Elmer, 25 Mich. 48, full note.

Contra—Peek *et al. v.* Heim *et al.*, 127 Pa. 500 (17 Atl. 984); Jennings *v.* Gage, 13 Ill. 611.

Where title to property is retained by seller, has he any rights in or to the property which the buyer takes in exchange therefor? Deadman *v.* Earle, 12 S. W. Rep. 330, 52 Ark. 164; Gen. Laws of Minn., 1885, Ch. 210; Gen. Statutes, 1878, p. 531, § 15.

Construction—Brinkham *v.* Central Bank, 22 S. W. Rep. 813.

Buchanan v. Smith
and p. 212

II.

RISK.

a.

"Loss follows the Title."

TERRY *v.* WHEELER.

Court of Appeals, New York, 1862.

25 N. Y. 520.

SELDEN, J. There may be some doubt whether the parol evidence in regard to the agreement to deliver the lumber was admissible, but if it were necessary to decide that question, I should regard it as admissible, on the ground that what is called the bill of sale was in substance a mere receipt for the purchase-money, and did not purport to be a contract: Dunn *v.* Hewitt, 2 Denio, 637; Blood *v.* Harrington, 8 Pick. 552; Filkins *v.* Whyland, 24 N. Y. 338. If the lumber had not been paid for, and the instrument, omitting the receipt, had been signed by the defendant and delivered, as a note or memorandum of the sale, it would then have been the evidence of a contract, executory on one part at least, and not open to explanation by parol. But looking at the whole instrument, I think it is to be regarded as a receipt, and not a contract, within the cases above cited. Of course, in this view, the memorandum at the foot of the bill is not regarded as a part of it; if it were, its character would be changed from a receipt to an executory contract, conclusive upon the parties, except so far as it was still a receipt: Eggleston *v.* Knickerbocker, 6 Barb. 458.

The point which is made upon the contradictory character of the evidence in relation to the contract to deliver the lumber on the cars, and its sufficiency to establish such contract, presents only a question of fact which this Court cannot review. Where the finding of a Court or referee upon a question of fact is ambiguous, the evidence may be referred to for

the purpose of removing the ambiguity, but not to reverse or modify a distinct finding, or to establish an independent fact not found: 19 N. Y. 210; 21 Id. 550; 22 Id. 324; 23 Id. 344. We can no more review the decision of the Court, that the testimony was not conflicting, than we can the conclusion that it was sufficient; and we can do neither without making a precedent which would open to review here the details of the evidence in all cases.

But in the view which I take of the remaining question, it becomes immaterial whether there was a contract to deliver at the cars or not. The lumber had not been actually delivered, but remained in the possession of the vendor. In the absence of any express contract to deliver, there was an implied one to deliver at the yard of the vendor, when called for. In either case the lumber did not remain at the risk of the vendor, if the title did not remain in him. The risk attends upon the title, not upon the possession, where there is no special agreement upon the subject: Tarling *v.* Baxter, 6 B. & C. 360, 13 Eng. Com. Law; Willis *v.* Willis, 6 Dana, 49; Hinde *v.* Whitehouse, 7 East, 558; Joyce *v.* Adams, 4 Seld. 296; 2 Kent's Com. 492, 496; Noy's Maxims, 88. I entertain no doubt that upon the facts found in this case, the title was in the vendee. The lumber was selected by both parties and designated as the lumber sold to Elmore, except the 600 pieces, which were selected by the parties, and the precise pieces sold designated with as much precision as if the purchaser had marked every piece with his name; that which was sold by measurement was inspected and measured, and the quantity ascertained; the price for the whole was agreed upon and paid, and a bill of parcels receipted and delivered to the purchaser. These facts, I think, vested the title in the purchaser, notwithstanding the agreement of the seller to deliver the lumber free of charge at the cars. "The sale of a specific chattel passes the property therein to the vendee, without delivery:" Chitty on Contr., 8th Am. ed., p. 332. "It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller *before* making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser:" Oly-

phant *v.* Baker, 5 Denio, 382. The authorities are numerous, where the expression is used that if anything remains to be done by the seller, the title does not pass; but the cases which are referred to to sustain that position only go the length of showing that where something is to be done by the seller to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the terms of the contract require, the title does not pass: 2 Kent's Com. 496; Hanson *v.* Myer, 6 East, 614; Simmons *v.* Swift, 5 B. & C. 857, 11 Eng. Com. Law; Joyce *v.* Adams, 4 Seld., 291; Field *v.* Moore, Lalor's Sup. 418. The list of cases to this effect might be indefinitely increased; but no case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it, the seller acts as bailee and not as owner. The questions which arise in such cases, as to sales, are questions of intention, such as arise in all other cases of the interpretation of contracts; and when the facts are ascertained, either by the written agreement of the parties or by the findings of a Court, as they are here, they are questions of law. That the parties to the contract in this case intended to pass the title to the lumber immediately, appears very clear; nor do I suppose that any one would question it, were it not for the apparent hardship of the case to the purchaser. If the property, instead of being lumber, had been sheep or cows, capable of increase (which follows the ownership), and there had been a sudden and large increase to the flock, or drove, before they could be delivered at the point agreed upon, I think no one would have said that the defendant could have discharged his obligation to deliver, and yet retained the increase. Such, however, must be the

conclusion, if the plaintiff's position is maintained. The judgment should be reversed, and a new trial granted.

Judgment reversed, and new trial ordered.

DARLINGTON, P. P., § 80; The risk may be fixed by agreement of the parties: The Elgell Cotton Case, 22 Wall. 180.

Buyer is barred by his *absolute promise* in a *conditional* sale: Tufts *v.* Griffin, 107 N. C. 47 (12 S. E. 68).

WARRANTY.

A warranty "is a collateral undertaking, forming part of the contract by the agreement of the parties, express or implied:" 2 Benjamin on Sales, § 929.

I.

EXPRESS.

WARDER *v.* BOWEN.

Supreme Court of Minnesota, 1883.

31 Minn. 335.

BERRY, J. This is an action to recover $275, which plaintiffs claim that defendant agreed to pay them as boot between his mower and harvester and binder, and their mower and harvester and binder. The machines were respectively delivered by each party to the other. The defence is that plaintiffs warranted their harvester and binder in respect to lightness of draught; that the agreement was that defendant should take it upon trial, and, if it did not fulfill the warranty, plaintiffs should take it back; that he took it accordingly, and, finding upon trial that it did not run as warranted, notified plaintiffs thereof, and that he should not keep it, and also returned it to them. Upon the issues raised by the reply, which denied the allegations of the answer, the defendant had a verdict. This appeal is taken from an order denying plaintiffs' motion for a new trial, and presents three principal questions, viz.: Was

there evidence (1) of the warranty; (2) of the breach; (3) of a return within a reasonable time?

As to the facts of the warranty and the breach, though testimony is conflicting, there is enough having a reasonable tendency to establish them. To constitute a warranty in law, neither the word "warrant," nor any equivalent word, is indispensable. A clear and positive affirmation or representation of the quality of a thing sold, when made by a seller as a part of a contract of sale, and relied upon by the purchaser, is a warranty: Hawkins *v.* Pemberton, 51 N. Y. 198; Zimmerman *v.* Morrow, 28 Min. 367; Torkelson *v.* Jorgenson, 28 Minn. 383; 2 Benjamin on Sales, § 929.

Was there sufficient evidence of a return of the warranted harvester and binder within a reasonable time? The time within which a required act is done may be so palpably unreasonable as to authorize a Court to pronounce it so as a matter of law: Boothley *v.* Scales, 27 Wis. 626, and cases cited. Yet, ordinarily, the question of reasonable time is for a jury: Cochran *v.* Toher, 14 Minn. 293 (385); Roberts *v.* Mazeppa Mill Co., 30 Id. 413. Upon such a question "the rules of ordinary practice and convenience become the legal measure and standard of right:" 1 Stark. Ev. 517.

We perceive nothing to take this case out of the ordinary rule. The defendant was reasonably entitled to retain the machine for a time sufficient to afford him a fair opportunity to test it thoroughly, for the purpose of ascertaining whether it answered the warranty, and this time might be prolonged by the assent of the plaintiffs or their agent: Boothley *v.* Scales, *supra.* The defendant appears to have expressed to the agent of plaintiffs his dissatisfaction with the "draught" of the machine within two or three days after his grain was in a condition to try it, and after he began to try it, and thereafterwards to have continued the trial at the express solicitation of the agent, from time to time, for a few days longer and until (the agent having come, according to appointment, to see it work and assist in making it work) he distinctly informed him that it was not satisfactory, and that he would not keep it; that it was the plaintiffs' machine, and he would then and there assist him in loading it upon his wagon if he wished him to

do so. In the course of two or three days defendant hauled the machine to Lake City, and there returned it to plaintiffs' agent, before the beginning of the wheat harvest. Upon such a state of facts it is impossible to say, as a matter of law, that the defendant's delay in returning the machine was unreasonable. The question of reasonable time was clearly one of fact for a jury, and the learned trial Judge correctly so held and instructed.

This disposes of the principal matters in the case. As to the use of the machine to cut Pruden's grain (aside from the fact that the jury might well consider this to be entirely proper in making a fair trial of it), it is enough that it was done with the co-operation of plaintiffs' agent while the machine was on trial.

There was no error in excluding the offer to show that defendant did not return the machine until after the season for the sale of it had passed, for, whatever the fact might be, it did not alter or impair defendant's right to have a fair opportunity to test the machine or to continue the trial of it as long as he was urged to do so by plaintiffs' agent.

Order affirmed.

Leggat *et al. v.* Sands's Ale Brewing Co., 60 Ill. 158;
Randall *et al. v.* Thornton, 43 Maine, 226;
Hahn *v.* Doolittle, 18 Wis. 196;
Warren *v.* Phila. Coal Co., 83 Pa. 436;
Smith *v.* Richards, 13 Peters, 26;
Marsh *v.* Webber, 13 Minn. 109;
Chanter *v.* Hopkins, 4 M. & W. 399.

Remedy—Scott *v.* Raymond, 31 Minn. 437; Thompson *v.* Libby, 34 Id. 374.

Patent Defects.

McCormick *v.* Kelly.

Supreme Court of Minnesota, 1881.

28 Minn. 135.

Dickinson, J. This action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs, for part of the purchase-price of a harvester purchased by the

former from the latter. The making of the note is not in issue; the only defence asserted being in the nature of a counter-claim for damages from an alleged breach of warranty, on the part of the plaintiffs, in respect to the harvester.

By his answer the defendant avers that he first took the machine on trial, and that, upon trial, it proved to be unsatisfactory and would not do good work, and that he notified the plaintiffs to take the machine away; whereupon the plaintiffs promised and agreed with the defendant to put the machine in good order and to furnish certain parts of the machine new, and warranted the machine to be well made, of good material, durable, and not liable to break or get out of order; that it would cut and elevate grain as well as any other machine, and was in all respects a first-class machine, and capable of doing first-class and satisfactory work as a harvesting machine; relying upon which promises, agreements, and warranties, defendant purchased the machine, giving the note in question. The answer further alleges that the plaintiffs refused to put the machine in good order, or to furnish new parts for the machine, and sets forth a breach of the terms of the warranty.

By a reply the plaintiffs put in issue the making of a warranty, as well the agreement to furnish new parts for the machine. The evidence on the part of the defendant tended to prove that he got the machine for trial before the commencement of the harvest of 1878; that it did not work well, although he used it to cut about 70 acres of grain; that he often made complaint to the agents of the plaintiffs, who urged him to keep the machine, and do the best he could with it; and that after harvest the agent of plaintiffs represented that it was as good a machine as there was in the market, and he would make it so; that it was all right, and would do as good work as any machine in market, and it should be fixed up in first-class order, with the new parts referred to in the answer; that the defendant purchased the machine then, and gave the note, relying, as he testifies, upon the representations made. The evidence tends to show that at this time the defendant knew the defects in the machine of which he now complains.

At the request of the defendant the Court instructed the jury as follows: "If the jury find, from the evidence, that the

plaintiffs expressly warranted the machine for which the note in suit was given, and that the defendant was induced by such warranty to execute and deliver said note, the plaintiffs are liable for all damages which the defendant has sustained by reason of the breach of such warranty, and this liability is not affected by the fact that the defendant tried said machine before the making of said warranty." To this the plaintiffs excepted.

At the request of the plaintiffs the Court instructed the jury as follows: "I charge you that where a general warranty is given on the sale of a machine, defects that were apparent at the time of the making of the bargain, and were fully known to the purchaser, cannot be relied upon as a defence to a note given for such machine, when the purchaser has such knowledge at the time of giving the same. (2) If you find that the machine was taken on trial under a contract to purchase, and that, after having fully tried it, the defendant gave his note therefor, he cannot offset against any such note damages arising from any alleged breach of warranty against defects known to the defendant at the time of settlement and giving of the note."

The Court further instructed the jury in the following language: "A vendor may warrant against a defect that is patent and obvious. . . . . You sell me a horse, and you warrant that horse to have four legs, and he has only three. I will take your word for it." The Court then read in the hearing of the jury the following from Addison on Contracts: "When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. If one sells purple to another, and saith to him, 'This is scarlet,' the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good." The Court then said to the jury: "Gentlemen, that is not the law of this State."

The Court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects

known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz., that for representations in the terms or form of a warranty of personal property, no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain: Marjeston *v.* Wright, 7 Bing. 603; Dyer *v.* Hargrave, 10 Ves. Jr. 506; Schuyler *v.* Russ, 2 Caines, 202; Kenner *v.* Harding, 85 Ill. 264; Williams *v.* Ingram, 21 Texas, 300; Marshall *v.* Drawhorn, 27 Ga. 275; Shewalter *v.* Ford, 34 Miss. 417; Brown *v.* Bigelow, 10 Allen, 242; Story on Cont., § 830; Benjamin on Sales (2d ed.), 502; Chitty on Cont. (11th Am. ed.) 644. A warranty, for the breach of the conditions of which an action *ex contractu* for damages can be maintained, must be a legal contract, and not a mere naked agreement. It must be a representation of something as a fact, upon which the purchaser relies, and by which he is induced, to some extent, to make the purchase, or is influenced in respect to the price or consideration: Oneida Manuf'g Society *v.* Lawrence, 4 Cow. 440; Lindsey *v.* Lindsey, 34 Miss. 432; Blythe *v.* Speake, 23 Texas, 429; Adams *v.* Johnson, 15 Ill. 345; Ender *v.* Scott, 11 Id. 35; Hawkins *v.* Berry, 10 Id. 36; 2 Add. on Cont. (Morgan's ed.) § 626. In the nature of things one cannot rely upon the truth of that which he knows to be untrue; and to a purchaser fully knowing the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true, but, as was said by the Court in Marshall *v.* Drawhorn, *supra*, it is "confined to those cases of doubt and difficulty where the purchaser relies on his warranty, and not on his own judgment." It has no application to the case of a purchaser who knows the defects in the property and the untruthfulness of the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects.

The fact that a portion of the charge given at the request of

the plaintiffs stated correctly the legal principle under consideration, cannot affect the result. In fact, that the instructions to the jury were thus inconsistent, and calculated to mislead or confuse, rather than inform and guide the jury, is, in itself, a sufficient reason why the verdict should not stand: Vanslyck *v.* Mills, 34 Iowa, 375; C. B. & Q. R. Co. *v.* Payne, 49 Ill. 499.

For the reasons already indicated, a new trial must be awarded, and it is unnecessary to consider whether the verdict is supported by the evidence presented in this case; nor is it necessary to consider some other alleged errors, involving no doubtful questions of law, and which are not likely to recur upon another trial. Anticipating, however, that upon the retrial, as in the former one, the question may arise as to the authority which an agent empowered to sell machinery of the kind in question may be presumed to possess in respect to the warranting of the property, in the absence of any proof of express authority, we will pass upon the question as it is presented by the facts in this case. For the purposes of this case it is sufficient to say that an agent, engaged for his principal in the business of selling personal property, is presumed to be authorized to sell with warranty. It may be, however, that if the property be of a kind not usually sold with warranty, no such presumption will be exercised: Nelson *v.* Cowing, 6 Hill, 336; Smith *v.* Tracy, 36 N. Y. 79; Schuchard *v.* Allens, 1 Wall. 359; Upton *v.* Suffolk County Mills, 11 Cush. 586; Boothby *v.* Scales, 27 Wis. 626; Ahern *v.* Goodspeed, 72 N. Y. 108; Murray *v.* Brooks, 41 Iowa, 45. In the case of such an agent engaged in selling harvesters, without proof of express authority to warrant, the Court will presume such authority.

Order reversed, and a new trial awarded.

But see as to patent defects in cases of doubt—Hill *v.* North, 34 Vt. 604.

Expression of Opinion—Fauntleroy *v.* Wilcox, 80 Ill. 477.

Semplex Commendatio—Tewkesbury *v.* Bennett, 31 Iowa, 83; Hogins *v.* Plympton, 11 Pick. 97.

In written contracts it is for the Court to decide whether there is a warranty; in oral contracts it is for the jury: Horn *v.* Buck, 48 Md. 358.

II.

IMPLIED.

One who sells, as his personal property in his possession, impliedly warrants his title to it.

GROSS *v.* KIERSKI.

Supreme Court of California, 1871.

41 Cal. 111.

WALLACE, J. The defendant, a dealer in musical instruments, sold and delivered to the plaintiff a piano-forte, nothing being said at the time concerning the title to the chattel. This was in February, 1867. In August, 1869, certain persons, claiming and ultimately showing themselves to be the owners of the chattel, commenced an action against Gross for its recovery. The latter thereupon gave notice to his vendor, the defendant, of the bringing of the action. In September following judgment passed against Gross. In October the piano-forte was taken from his possession, and in November, 1869, he brought the present action against Kierski for breach of the warranty of title to the chattel. The Court below gave judgment for the plaintiff, and to reverse that judgment this appeal is brought.

The vendor of goods and chattels in possession is held, by implication of law, to warrant the title. This rule was recognized by this Court in the case of Miller *v.* Van Tassel, 24 Cal. 458, and may be said to have become firmly ingrafted in the jurisprudence of this country, whatever may be the doubts at present surrounding it in England, as indicated in the recent cases of Morley *v.* Attenborough, 3 Welsby, Hurlstone & Gordon Exch. R. 507, and Sims *v.* Marryat, 17 Q. B. 290, where it was said by Lord CAMPBELL, C. J., that "on that point the law is not in a satisfactory state."

In the case at bar this general rule is not questioned by the defendant, but it is claimed that the action here was not brought within two years next after the breach of the warranty, and is therefore barred by the Statute of Limitations, which was

pleaded below, and is insisted upon in this Court; and this presents the only question to be determined.

The statute undoubtedly commenced to run from the earliest time at which the plaintiff might have sued. This would, of course, be that period at which the breach must be considered to have happened. And this is the precise question upon which the parties are at issue here—the defendant claiming that his warranty was broken in February, 1867, when he sold and delivered the chattel, and the plaintiff insisting that the breach did not occur until October, 1869, when the property was taken by the true owner.

In an action brought against the vendor of chattels upon an *express* warranty of title, the authorities are believed to be uniform upon the point that there is no breach in contemplation of law until the vendee's possession of the goods is in some way disturbed, by reason of the title of the true owner.

No substantial difference in this respect is perceived between an express warranty of title made by a vendor upon sale of chattels out of possession and the warranty of title implied by law upon a sale of goods in possession. The fact of the goods being out of the possession of the vendor may well be considered to put the vendee upon his guard, and it is his own folly if, under such circumstances, he will not protect himself by exacting an express agreement to warrant the title. The doctrine of *caveat emptor* would apply to such a case.

But when the goods are at the time in the possession of the vendor, who deals with them as owner, and under such circumstances sells and delivers them to the purchaser, the law will imply against the vendor that he warrants the title to the property sold. This implication is indulged for the protection of the purchaser against what would otherwise be the fraud of the vendor, practised upon him when he is himself not chargeable with negligence; for it is unreasonable to exact of the purchaser of goods that he is in every case to institute an inquiry into the title of his merchant, upon pain of losing both the goods and their price. The purpose of the law in implying the warranty is the protection of the purchaser; it determines that the vendor did warrant the title to the goods, because it considers that, under the circumstances, he ought to

have done so. It declares that his silence shall be taken to be a warranty of the soundness of his title. The sale and delivery of the goods in possession, where nothing is said about the title, is, therefore, precisely equivalent to an express warranty of title, and, the facts being ascertained, the rights and liabilities of the parties are exactly the same.

It is true that the Court of Appeals of Kentucky hold that there is a distinction between an express warranty of title to chattels and the warranty of title implied by law. The express warranty is likened to a covenant to warrant and defend the title, when inserted in a deed of conveyance of lands, and is, therefore, said to be unbroken until an eviction by the true owner, under paramount title, has taken place. The implied warranty is, however, compared to a covenant of seizin, which is said to be broken, if at all, at the instant that it is entered into. As a consequence, it is the settled rule in that State that the Statute of Limitations upon breach of an express warranty of title to personal property commences to run from the time when the vendee is disturbed; while in case of implied warranty it is set in motion instantly upon the sale and delivery of the goods: 4 Bibb. 304; 2 Marsh. 217; 4 B. Monroe, 201; 1 Metc. Ky. R. 572. For the distinction thus made I think that no good reason can be shown. Its operation would, in many instances, deprive the purchaser of the very protection which it is the purpose of the implication to afford. Nor is it clear that the analogy supposed to exist between the covenant of seizin and the implied warranty of chattels can be maintained. Mr. Rawle, in his treatise on the covenant of seizin (Rawle on Cov., 3d ed. 50), assumes that the implied warranty of title to chattels is understood to be "a title sufficient to retain the possession in the vendee of the chattels," and in illustration of the distinction between seizin in fact and seizin in law, as to real property, he says: "An analogy may be found in the rule with respect to chattels. In the sale of these a warranty of title is implied by the civil and the common law. . . Yet a subsequent loss of possession by title paramount will be a breach of this warranty, because the vendor is understood to have agreed lawfully to transfer a possession which can be retained," etc.

The doctrine of the Court of Appeals of Kentucky is believed

to be unsupported either by text-writers upon the law or the adjudications of the Courts of other States of the Union.

In Word *v.* Cavin, 1 Head, 507, the Supreme Court of Tennessee held that, upon breach of the implied warranty of title to chattels the Statute of Limitations commenced to run upon the possession of the chattel being lost, or upon voluntary offer by the vendee to restore it to the seller.

Linton *v.* Porter, 31 Ill. 107, was an action upon a promissory note given upon the purchase of a chattel with implied warranty of title. The Supreme Court of Illinois held that it was no defence to say that the vendor had no title while the possession of the vendee remained undisturbed by the true owner.

In Case *v.* Hall, 24 Wend. 102, upon a state of facts substantially similar to those in Linton *v.* Porter, the defence was overruled on the ground that where the vendee relies upon the warranty of title, express or implied, there must be a recovery by the real owner before an action can be maintained. See, also, Vibbard *et als. v.* Johnson, 19 Johns. 77; Story on Sales, sec. 203; Parsons Merc. Law, 2d ed. 50, and cases there cited in note; Hilliard on Sales, 3d ed. 391, and cases cited in note.

It results from these views that the plaintiff's cause of action accrued upon the loss of the chattel in October, 1869, and the Statute of Limitations will not avail the defendant.

Judgment affirmed.

DARLINGTON, P. P., 83, 362; 2 Sch. Per. Prop., § 78; Davis *v.* Smith, 7 Minn. 414; Scranton *v.* Clark, 39 N. Y. 220; Whitney *v.* Heywood, 6 Cush. 86; Thurston *v.* Spratt, 52 Maine, 202; Close *v.* Crossland, 47 Minn. 500. Warranty does not inure to buyer's vendee. Moser *v.* Hoch, 3 Pa. 230.

Constructive Possession.

SHATTUCK *v.* GREEN.

Supreme Judicial Court of Massachusetts, 1870.

104 Mass. 42.

MORTON, J. It is a general rule of law in this country, that in a sale of chattels a warranty of title is implied, unless the

circumstances are such as to give rise to a contrary presumption: 1 Smith Lead. Cas. (6th Am. ed.) 242; 1 Parsons on Contracts (5th ed.), 576, and cases cited. If the vendor has either actual or constructive possession, and sells the chattels and not merely his interest in them, such sale is equivalent to and affirmation of title, and a warranty is implied. In Whitney *v.* Heywood, 6 Cush. 82, 86, DEWEY, J., says, "Possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied." The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells goods thus held as his, a warranty of title is implied: Hubbard *v.* Bliss, 12 Allen, 590; Cushing *v.* Breed, 14 Id. 376.

In the case at bar, it appeared that Shattuck, on December 7, 1866, bought of Wilks W. Corey an undivided half of the stock in trade, furniture and fixtures of a dining saloon in Boston, and on December 11, 1866, sold the same to Green. Shattuck was in New Hampshire, and did not take manual possession of the property, but it remained, as it had previously been, in the possession and use of Corey & Stiles, who were carrying on the saloon, said Corey being a son of Wilks W. Corey. Green, after the sale to him, entered into possession in connection with the younger Corey, and remained in possession until the property was taken by the National Warehouse Company under a paramount title. Thus Corey & Stiles were in actual possession of the chattels at the time of the sale to Green. There was no evidence that they held them adversely to Shattuck, or to Wilks W. Corey and Shattuck, who by the sale of December 7 became tenants in common. On the contrary, there was evidence which might well satisfy the jury that they held possession of them as the bailees or agents of Wilks W. Corey and Shattuck. If this was so, and Shattuck sold to Green one undivided half of the property as his, there was an implied warranty of title. The ruling at the trial that the jury would not be authorized to find an implied warranty was therefore erroneous. The argument that the written contract between the parties

contains no express warranty, and excludes an implied one, cannot prevail. The parties did not put their contract in writing. The indorsement on the bill of sale does not purport to set out the contract of sale. That appears to have been by parol; and the fact that the vendor delivered the bill of sale, with such assignment on it, either as a muniment of title, or as a symbolical delivery, or as an incident of the transaction, does not prevent his liability upon the implied warranty of title.

In considering these exceptions, we are obliged to assume as true all the facts which the testimony in favor of the excepting parties tends to establish. At the new trial, it will of course be for the jury to decide whether there was in fact a sale by Shattuck to Green, or whether Shattuck acted merely as the agent of Green in the purchase of Corey, so that no warranty of title would be implied against him.

Exceptions sustained.

Close *v.* Crossland, 47 Minn. 500;

After acquired title—Sherman *v.* Champlain Transportation Co., 31 Vt. 162.

Chattels not in seller's possession —Huntingdon *v.* Hall, 36 Maine, 501.

If seller affirms that a chattel not in his possession is his, he is bound to answer for the title: Case *v.* Hall, 24 Wend. 102.

No implied warranty in official sales: Allegre *v.* Tenant, 9 Wheat. 616.

There is an implied warranty of title, and that the chattel is free from incumbrance in case of exchange, as well as sale. 47 Minn. 500, *supra*.

QUALITY.

A.

CHATTELS SPECIFIED.

In the sale of a specific chattel, where the buyer has inspected the same, or has had an opportunity to do so, there is no implied warranty as to the quality of the thing sold.

FRAZIER *v.* HARVEY.

Supreme Court of Errors, Connecticut, 1867.

34 Conn. 469.

An action upon an implied warranty as to the soundness of hogs sold by the defendants to the plaintiff, who examined the property before purchasing.

HINMAN, C. J. This action is on a warranty of soundness and freedom from disease on a sale of certain hogs by the defendants to the plaintiff. There were also joined to the count on the warranty the common money counts. On the trial there was conflicting evidence in respect to the warranty, upon which no question arises here. But it was claimed by the plaintiff that if he had not proved the warranty he was still entitled to recover on the money counts, on the ground of a failure of the consideration paid for the hogs, as he had proved, as he claimed, that at the time of his purchase of them they were all affected with a disease, of which in the course of three or four weeks they all died, and so they were of no value whatever at that time, and there was therefore an entire failure of the consideration; and the Court, on the plaintiff's request, charged the jury that if they found the facts on this part of the case to be as claimed by the plaintiff, he was entitled to recover upon the money counts the price paid by him for the hogs, with the interest thereon from the time he bought them.

This part of the charge we think erroneous. The rule of

the common law is, that where there is no express warranty, and no fraud in the sale of personal property, the purchaser takes the risk of its quality and condition. He must therefore suffer all losses arising from latent defects equally unknown to both parties. This rule, which with us was definitely settled by the case of Dean *v.* Mason, 4 Conn. 432, is now too well understood as prevailing wherever the Courts profess to be governed by the principles of the common law to require to be supported by the citation of authorities. But it is impossible to give full effect to this rule upon the idea that the charge in this case was correct, since it follows as a necessary inference from the rule that the total worthlessness of the article sold is as much at the risk of the purchaser as can be any partial defect which only impairs to some extent its value. In other words, the rule itself would be abrogated in all those cases where the defect in the quality is such as to render the article worthless. But the plaintiff cites in support of a different doctrine the general principle to be found in the text-books, that where the consideration of a contract fails the contract may be avoided, and if money has been paid for a consideration which has thus failed it may be recovered back. But the difficulty in the plaintiff's case is, that there is no failure of consideration where the purchaser gets precisely what he agreed to purchase. Where the purchase is of chattels having a commercial value in the market, like live stock, it cannot be said of them that they are wholly worthless while the quality of them is unknown, or a secret disease by which they are affected is undeveloped. At the time of this purchase the animals appeared to be free from disease and to be sound. Presumptively the fair market price for such animals was paid for them. They were then of value at the time of the purchase, and as the purchaser takes the risk of the quality where that is equally unknown to both parties, the secret defect which was afterwards developed should have been guarded against by insisting upon a warranty, unless the purchaser expected and intended to suffer any loss arising therefrom. The plaintiff has referred us to no case which supports his view of the law. This of itself is a strong argument against him; and there are also direct authorities to the effect that the total worthlessness

of a chattel sold does not amount to a failure of consideration where the purchaser gets what he contemplated when he made the purchase; as where putrid fish wholly unfit for use as food were sold, and there was no warranty of the quality, the plaintiff claimed to recover the purchase-money on the ground of the failure of the consideration; but the Court said that if, instead of stock fish, the defendant had delivered a quantity of sawdust, the price might have been recovered back; but that stock fish were delivered, and the defendant could not be permitted to try whether they were fit for use in an action for money had and received: Fortune *v.* Lingham, 2 Campb. 416. See, also, Mason *v.* Chappell, 15 Gratt. 572, to the same effect. Indeed, there are many cases where this ground could have been successfully taken if it had been supposed to be tenable, as in Moses *v.* Mead, 1 Denio, 378, and other cases cited by the defendants' counsel on their brief.

We advise the Superior Court to grant a new trial.

DARLINGTON, P. P., 83.

Weimer *v.* Clement, 37 Pa. 147; Fitch *v.* Archibald, 29 N. J. Law, 160;

Slaughter *v.* Gerson, 13 Wallace, 379;

See Hood *v.* Bloch, 29 W. Va. 244 (11 S. E. Rep. 210).

There is no implied warranty where the buyer neglects to examine, or makes a careless examination of the property: Byrne *v.* Jansen, 50 Calif. 624; McKnight *v.* Baillie, 19 Pa. 375.

(a.)

PROVISIONS.

GIROUX *v.* STEDMAN.

Supreme Judicial Court of Massachusetts, 1888.

145 Mass. 439. 1 A.S.R. 472

DEVENS, J. It was known to the defendants that the plaintiffs purchased the meat to be used as provisions, but it was held by the presiding Judge that, in order that they should recover, they must prove the allegations in their declarations, that the defendants knew that the meat sold by them was

unwholesome and improper to be used as provisions. He instructed the jury that, at common law, the general rule is, that where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in, or has a right to sell, the chattel. He added, that there is an exception to this general rule where a provision dealer or marketman sells provisions, as meat and vegetables, to his customers for use, and that in such case there would be an implied warranty that they were fit for use and wholesome.

Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that the defendants were brought within it. The contention of the plaintiffs is, that, even if the rule is well established that where there is no expressed warranty and no fraud, no warranty of the quality of the thing sold is implied by law, and that the maxim of *caveat emptor* applies, there is a more general exception which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made.

That in a sale of an animal by one dealer to another, even with the knowledge that the latter dealer intends to convert it into meat for domestic use, or that in the sale of provisions in the course of commercial transactions there is no implied warranty of the quality, appears to be well settled: Howard *v.* Emerson, 110 Mass. 320, and cases cited: Burnby *v.* Bollett, 16 M. & W. 644. While occasional expressions may be found, as in Van Bracklin *v.* Fonda, 12 Johns. 468, which sustain the plaintiffs' contention, we have found but one decided case which supports it. In Van Bracklin *v.* Fonda, *ubi supra*, it is said that in a sale of provisions the vendor is bound to know that they are sound, at his peril, but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved.

The case of Hoover *v.* Peters, 18 Mich. 51, does sustain the plaintiffs' contention, as it is there held, that where articles of

food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or by any other person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business than he should be called on to bear. The opinion is not supported by any citation of authorities. In a dissenting opinion by Mr. Justice CHRISTIANCY it is said, "Had it appeared that he [the defendant] was the keeper of a meat market or butcher's shop and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brethren have expressed." If there is an exception to the rule of *caveat emptor* which grows out of the circumstances of the case and the relations of buyer and seller, where the latter is a general dealer and the former a purchaser for immediate use, there appears no reason why it should be further extended.

In the case at bar, the defendants were not common dealers in provisions, or marketmen. They were farmers selling a portion of the produce of their farms. No representations of the quality of the meat sold was made by them. In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for the purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser.

The plaintiffs contend that the case of French *v.* Vining, 102 Mass. 132, is decisive in their favor, but it appears to us otherwise. In that case the defendant sold hay, which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effects of eating the hay the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive; his belief that he had remedied the difficulty was conjectural and uncertain, and proved to be wholly erroneous.

In the case at bar, while the defendants' herd had been exposed to hog cholera, there was evidence that a portion of it only had been affected, and further, that, even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease; and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome.

In French *v.* Vining, the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued because it had been unsuccessful, if he sold the hay without informing the purchaser of the dangerous injury which it had received.

Exceptions overruled.

DARLINGTON, P. P., 84-85; 2 Benj. on Sales, § 1012; Ryder *v.* Neitge, 21 Minn. 70; Winsor *v.* Lombard, 18 Pick. 57.

(b.)

EXCEPTIONS.

Some American cases hold that there is an implied warranty as to the quality of *provisions* sold for immediate consumption or dómestic use.

SINCLAIR *v.* HATHAWAY.

Supreme Court of Michigan, 1885.

57 Mich. 60. 24 N.W.R. 327

CAMPBELL, J. Plaintiff sued defendant for a balance claimed to be due for bread. Defendant claimed that the account had been balanced by bad bread returned, and by a sum of ten dollars paid in settlement of accounts.

Plaintiff was a baker, and defendant's business was to sup-

ply bread to customers about the city. It appears that for a period defendant was employed by plaintiff to sell his bread, and make returns and pay for the bread furnished daily. Defendant claims that on several occasions the bread furnished was bad and unwholesome, and that he returned it to a sufficient extent to overbalance his payments, and that there was an understanding to that effect. The parties are directly at variance on the facts. There was a good deal of testimony showing that bread was often made unfit for use, and that plaintiff had to sell it for feeding animals. He swore there was never any such thing.

The Court below rightly excluded evidence of a Sunday contract before the business was entered into. But there was testimony of subsequent dealings tending to prove the theory of the defence.

The case being an appeal from a justice, it was shown and seems to have been admitted that in the justice's Court plaintiff swore that the amount due him was only $65, while in the Circuit he swore to $103.79, and recovered it. The Court was asked to charge the jury that if plaintiff so swore below, and so changed his testimony without explaining why, that circumstance should weigh with the jury against the good faith of the claim. The Court refused so to charge, but in the charge the Court made this remark: "Defendant also states that the complainant only claimed $65 in the justice's Court, but the complainant undertakes to explain it by saying that he made a mistake, as he did not have his books of account with him at the time." This had a decided tendency to induce the jury to regard the point as of no consequence. But it is not a small matter for a person who goes into Court to swear to his claim, to pay so little regard to his oath as to take no pains to find out what is due. And beyond this, there is nothing in the plaintiff's testimony to show any such explanation given by him on oath. The error was material.

The Court also refused to charge that plaintiff was subject by law to an implied warranty that the bread was wholesome, and in the charge stated the defendant's objections to apply chiefly to its marketable quality, and to its being soiled externally by getting dirty on the floor. There was, however,

testimony from several sources that the bread was unfit for food, apart from its external appearance.

It was held in Hoover *v.* Peters, 18 Mich. 51, that there is an implied warranty of wholesomeness in the sale of provisions for direct consumption. This question is not discussed in plaintiff's brief, and was left entirely out of view by the Court, and the only reference to it was in connection with an express contract.

In this case defendant was, as plaintiff claims, in his employ as a peddler, bound to pay for his bread, at a discount, and his connection with the sales brings the case within the same principle. Defendant cannot be treated as a purchaser from a wholesale dealer of articles sold in the market for purposes of commerce. Bread is an article sold for immediate consumption, and never enters into commerce, and as one of the prime necessaries of life is of no use unless it is good for food. Defendant, as a mere middle-man between the baker and the consumer, and acting in his employment, had a right to expect bad bread to be made good, and the Court should have so held. Mere externals he could see for himself, but bad quality would not always be detected without such a minute examination as the circumstances of such a business would render it difficult to make.

The judgment must be reversed, and a new trial granted.

2 Sch. on Per. Prop., § 348;
Van Braklin *v.* Fanda, 12 Johns. 468;
Moses *v.* Mead, 1 Denio, 378;
Winsor *v.* Lombard, 18 Pick. 61;
Divine *v.* McCormick, 50 Barb. 116.

One case goes to the extent of stating that any purchase for domestic consumption is protected: Hoover *v.* Peters, 18 Mich. 51.

As to food for cattle—French *v.* Vining, 102 Mass. 132; Lukens *v.* Freiund, 27 Kan. 664.

B.

CHATTELS NOT SPECIFIED.

Where the chattel sold is not specified, but is to be manufactured or furnished by the seller for a specific purpose, there is an implied warranty that the article shall be fit for that purpose.

a.

Supplied by a Manufacturer.

PEASE *v.* SABINE.

Supreme Court of Vermont.

38 Vt. 432.

PIERPOINT, Ch. J. The questions presented by the exceptions arise under the first count in the declaration, in which the plaintiff declares upon a warranty.

The plaintiff requested the Court to charge the jury that "where produce requiring skill in the manufacture thereof, as in the case of the manufacture of butter and cheese, and especially where the same were subject to latent defects that could not be discovered by the purchaser, was sold by the manufacturer thereof, to a dealer for a special purpose, then made known to the seller, and a sound price was paid for the article, the law would imply a warranty that the article was fit for such purpose." The Court declined so to charge the jury, and charged the reverse. In this we think there was error.

The principle seems to be now well settled by the authorities, that when the manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller thereby warrants it fit and proper for such purpose, and free from latent defects. The law therefrom implies a warranty of the fitness of the article for the purpose. Certainly so, if the unfitness of

the article for the particular purpose is occasioned by any want of skill or care, or is the result of any defect, from any cause, in the process of its manufacture; that is, he warrants it to be as fit and suitable for the purpose indicated as any good, sound, well-made article of its kind would be.

This principle is fully discussed and decided in Jones *v.* Bright, 5 Bing. 533, 15 Eng. Com. Law, and in other cases referred to by counsel in the course of the argument, and which it is not necessary to cite here.

In this case the cheese, which is the subject of controversy, was manufactured by the defendant. It was purchased by the plaintiff for the purpose of being shipped to a foreign country, and that purpose was made known to the defendant at the time.

The evidence on the part of the plaintiff tended to show, that at the time of the sale of the cheese by the defendant, many of them were unsound and defective by reason of their being infested with maggots, of which unsoundness the plaintiff was ignorant. No question is made but what if this unsoundness existed in fact, it resulted from a want of care and attention on the part of the manufacturer in manufacturing, and bringing them into a marketable condition. The evidence also tended to show, that the defect, if it existed, was a latent one, as the defendant himself swore that he was ignorant of it, and that it did not in fact exist. If the defect existed and the defendant was ignorant of it, it is not probable that it could have been discovered without a very critical examination.

The plaintiff's evidence also tended to show, that this defect rendered the cheese unfit to be sent to a foreign market, and it would seem to render it equally unfit for any other market, either in the cities of this country, or for sale at home; but, however that may be, the evidence tended to show that it was unfit for the purpose for which it was bought, and that the defect resulted from the fault of the defendant in its manufacture. Thus tending to show a case clearly within the rule heretofore laid down, and entitled the plaintiff to a charge to the jury substantially such as he requested.

Other questions have been discussed on the hearing, but as

the conclusion to which we have come upon this point results in a reversal of the judgment, and a new trial, we do not pass upon them.

Judgment reversed and case remanded.

DARLINGTON, P. P., 83–84; Rodgers *et al. v.* Niles *et al.*, 11 Ohio St. 48; Merrian *v.* Field, 24 Wis. 640; Brown *v.* Sayles, 27 Vt. 227; Harris *v.* Waite, 51 Id. 480; Macfarlane *v.* Taylor, L. R., 1 S. & D. App. 245. See Curtis M'f'g Company *v.* Williams, 3 S. W. Rep. 517; Mann *et al. v.* Everston, 32 Ind. 355; Hood *v.* Bloch, 29 W. Va. 244; Leopold *v.* Van Kirk *et al.*, 27 Wis. 152; Thoms *v.* Dingley, 70 Maine, 100; Jones *v.* Bright, 5 Bing. 533, 15 Eng. Com. Law. But see Cosgrove *v.* Bennett, 32 Minn. 371; Goulds *et al. v.* Brophy, 42 Id. 109.

b.

Supplied by others than Manufacturers.

SHAW *et al. v.* SMITH *et al.*

25 Pac. Rep. 886.

VALENTINE, J. This was an action brought before a justice of the peace of Cowley County on January 31, 1887, by G. B. Shaw & Co. against Yates Smith and James W. McClellen, for the recovery of $12 and interest, upon the following instrument in writing, to wit:—

"CAMBRIDGE, April 30, 1886.

"On or before the first day of October, 1886, we promise to pay to the order of G. B. Shaw & Co., at their office in Cambridge, twelve dollars, for value received, with interest after maturity, at the rate of ten per cent. per annum until paid. This note is given in part consideration of the sale to Y. Smith of eight bushels flaxseed, by said G. B. Shaw & Co.; and, as a further consideration therefor, we agree to plant 14 acres with said seed, to cultivate, harvest, and clean the same in proper and careful manner, and deliver to G. B. Shaw & Co. at Cambridge, Kansas, on or before the 1st day of December, 1886, the whole crop raised therefrom, at a price mentioned below per bushel of 56 pounds, for pure and prime flaxseed; flaxseed not pure and

prime to be inspected and graded subject to the rules of the St. Louis Merchants' Exchange. And should we sell or trade, or attempt to offer to sell or trade, such crop to any other person or persons than said G. B. Shaw & Co., or order, then the note hereto attached shall immediately become due and payable; and the said G. B. Shaw & Co., or their assigns, are hereby authorized to enter any building or premises without any legal process whatever, and seize and remove such crop whatsoever (and in whosesoever possession) the same may be found, and to pay me balance on demand, after the amount due upon said note has been deducted, together with all costs and expense incurred, where seizure is necessary; price to be paid per bushel, on basis of pure, to be 35 cents less than St. Louis market price on day of delivery.

"YATES SMITH, JAMES W. MCCLELLEN."

Afterwards the case was taken on appeal to the District Court, where the case was tried before the Court and a jury, with the result hereafter stated. The plaintiffs' bill of particulars simply set up the foregoing instrument, and asked judgment thereon for $12, and interest at the rate of 10 per cent. per annum from October 1, 1886. The defendants' amended answer thereto and cross-petition alleged that the flaxseed for which the instrument sued on was given was purchased by Smith, for the purpose of sowing it and raising a crop; that it was warranted by the plaintiffs to be good, but that it was worthless; that he (Smith) sowed it, but that it did not germinate; and that he lost his time, labor, and use of his ground; and that he was damaged thereby in the sum of $150. And he asked judgment for that amount and costs of suit. The trial resulted in a verdict in favor of the defendants and against the plaintiffs for the sum of $90, and judgment was rendered accordingly; and the plaintiffs, as plaintiffs in error, bring the case to this Court for review.

It appears from the evidence that the facts of the case are substantially as follows: The plaintiffs, G. B. Shaw & Co., were dealers in flaxseed at Cambridge, in said Cowley County. Smith went to their place of business about April 20, 1886, and found Joseph Fraley, their agent, in charge. Shaw & Co. did not have any flaxseed on hand, but they were about to order

some. Smith told Fraley to order eight bushels for him, for the purpose of sowing it and raising a crop. Fraley told Smith that they would furnish the flaxseed upon the conditions substantially as set forth in the foregoing instrument. Afterwards the flaxseed arrived, and Fraley gave notice to Smith. Smith then, on April 30, 1886, went to Cambridge and received the seed, about eight bushels in amount, inclosed in sacks, from Fraley, and took it home and sowed it upon about 12 acres of ground. The seed appeared to be good, and Fraley and Smith believed it to be good, but in fact it was not good, and it did not germinate; and Smith lost all his time and labor in procuring it, and in preparing the ground for sowing it, and in sowing it, and he got no crop, and lost the use of his ground. And upon these facts the jury found in favor of defendants and against the plaintiffs, and assessed the defendants' damages at $90, as aforesaid. The only questions now involved in the case are as follows: (1) Under the contract between the parties, and under the circumstances of the case, was there any such implied warranty on the part of Shaw & Co., respecting the sufficiency of the flaxseed for the purpose of sowing it and raising a crop, that the plaintiffs may be defeated in their action on the aforesaid written instrument? (2) If so, then under such contract and warranty and circumstances, may the defendants, Smith and McClellen, or rather Smith, recover damages for Smith's losses, necessarily occasioned by reason of the worthlessness of the flaxseed? (3) And, if so, then what is the measure of Smith's damages? The maxim of the common law, *caveat emptor*, is the general rule applicable to purchasers and sales of personal property so far as the quality of the property is concerned; and, under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, was there any implied warranty? At the time when the contract for the purchase and sale of the flaxseed was entered into, such seed was not present so that it could be inspected by the purchaser, and when it arrived and was delivered to him the defect in the seed was not apparent, and

was probably not discoverable by any ordinary means of inspection, and it was not discovered until after it was sowed, and when it failed to germinate. When the original contract for the purchase and sale of the flaxseed was made, the flaxseed was purchased and sold for the particular purpose, known to both the buyer and the seller, of sowing it in a field, and of raising a crop from it; and therefore this purpose was a part of the contract, and demanded that the seed should be sufficient for such purpose. It, in effect, constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller, in effect, agreed that the seed furnished should be the kind of seed agreed upon. The entire contract when made was executory, and it was to be executed and performed afterwards, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about ten days after the contract was made, and of course the seed was to be a kind of seed that would grow. The purchaser was afterwards to sow it and to raise a crop, and afterwards the purchaser was to sell, and the seller was to buy the crop upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed should be sufficient for the purpose for which it was bought and sold: Wolcott *v.* Mount, 36 N. J. Law, 262; 38 Id. 496; Van Wyck *v.* Allen, 69 N. Y. 61; White *v.* Miller, 7 Hun, 427; 71 N. Y. 118; Whitaker *v.* McCormick, 6 Mo. App. 114. We also think that the purchaser may recover damages from the seller for all the losses necessarily sustained by the purchaser by reason of the worthlessness of the flaxseed furnished by the seller. See the authorities above cited, and also the following: Passenger *v.* Thorburn, 34 N. Y. 634; Flick *v.* Wetherbee, 20 Wis. 392; Ferris *v.* Comstock, 33 Conn. 513; Randall *v.* Raper, El., Bl. & El. 84. And it is not claimed that the purchaser in the present case recovered for more than the foregoing losses. The claim is that the purchaser had no right to recover at all, and that the seller had the right to recover on the instrument

sued on. No other questions are presented. We think no material error was committed in the case, and the judgment of the Court below will be affirmed. All the justices concurring.

Shatto *v.* Abernethy, 35 Minn. 538; Murchie *v.* Cornell, 155 Mass. 60.

c.

Implied warranty as to merchantable quality of chattels.

Babcock *v.* Trice.

Supreme Court of Illinois, 1857.

18 Ill. 420.

Skinner, J. Trice sued Babcock and declared in *indebitatus* assumpsit for corn sold and delivered. Babcock pleaded the general issue and a special plea of set-off, for money had and received, etc. Babcock proved a special contract for the sale and the delivery of the corn, at a warehouse upon a railroad, in sacks, at fifty cents per bushel; and proved that some of the corn, when delivered at the warehouse, was in a damaged condition and of less value than sound merchantable corn. The corn was delivered through a warehouseman, and it did not appear that Babcock had seen or knew the condition of the corn when delivered. The Court, on the part of Trice, instructed the jury as follows:—

"When the plaintiff delivered the corn at the depot in Cameron, to any person authorized by the defendant to receive the same, and the same was accepted by such person, then such delivery and acceptance is the same as a delivery and acceptance to and by the defendant himself; and although the jury may believe, from the evidence, that a part of the corn was damaged, yet, if they further believe that such injured corn was accepted by the defendant, or his agent, under the contract, then the defendant has waived his right to object to the payment for the corn because of the bad quality."

This instruction is not the law. Under this contract the law will imply that the parties contemplated that the corn should be of a *fair and merchantable quality*, and will raise a warranty to that effect: Misner *v.* Granger, 4 Gilm. R. 69; Chitty on Cont. 392, 393; Parsons on Cont. 465, 466. The contract was executory, the corn was not purchased upon inspection, and the duty of Trice was to deliver a fair article, fit for use and market as a sound commodity; and his duty under the contract was not performed until he had done so.

The acceptance of the corn by the warehouseman was not a waiver of the implied warranty, nor would a delivery of the corn to Babcock personally at the warehouse have precluded him from setting up in defence of an action for the price, a breach of warranty as to its quality.

He was not bound to refuse to receive the corn because some portion of it was damaged, nor was he bound to return it on discovery of the fact. He might rely upon the warranty: Chitty on Cont. 401; Mondell *v.* Steel, 8 M. and Welsby, 858; 2 Smith's Leading Cases, 20, 21 and 22.

It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, *without complaint*, may raise a presumption that it was of the quality contemplated by the parties; but it will not preclude the party from showing and setting up the actual defect in quality and condition. Babcock might, in his plea of set-off, have set up the special contract and breach of the warranty; and, if he had done so, and it appeared that his damages exceeded the amount unpaid on the purchase of the corn, he could have recovered the difference under his plea. But his plea gave no notice that he relied upon the warranty to recover his damages by way of set-off, in the nature of a cross-action. He could, however, under the general issue, prove the facts out of which the warranty arose, the breach and his damages, by way of *recoupment;* and, if the evidence justified it, defeat Trice's demand in part or in whole, but he could not recover any excess of damages over the damages proved by Trice, the plaintiff: Stow *v.* Yarwood, 14 Ill. R. 424; Bosten *v.* Butter, 7 East, 479; Poulton *v.* Lattimore, 9 Br. C. 259; Farnsworth *v.* Garrard, 1 Camp. R. 38.

This disposes of the questions necessarily involved in the record.

Judgment reversed and cause remanded.

Judgment reversed.

Merriam *v.* Field, 24 Wis. 640; Weiger *v.* Gould, 86 Ill. 180;
McClung *v.* Kelley, 21 Iowa, 508; Howard *v.* Hoey, 23 Wend. 350.

d.

As to Quality of Goods sold "by Sample."

Hanson *et al.* *v.* Busse.

Supreme Court of Illinois, 1867.

45 Ill. 496.

Mr. Justice Lawrence delivered the opinion of the Court.

This was an action, brought by Hanson and Barrett, against Busse, to recover the price of one hundred and ten barrels of apples, sold by them to Busse. The demand was resisted, on the ground that the apples, when opened, proved to be decayed and entirely worthless. The jury found for the defendant and the plaintiffs appealed.

The Court gave for the defendant a series of instructions, nearly all of which embody the idea that if the plaintiffs represented the apples to be good, and the defendant bought them, relying upon such representations, and they were bad and unmerchantable, and the defendant offered, at once, to return them, he would not be liable for the price.

In reference to the sale of personal property, which is open to the inspection and examination of the purchaser, this would not be the law. In such cases it is immaterial how far the purchaser may rely upon the representations of the vendor as to the quality of the goods, if there was no intention on the part of the vendor to warrant, and if he used no language fairly implying such an intent. The different rule of the civil law may be founded on higher morals, and the modern decisions, both in England and this country, seem to be tending in that direction. This tendency is shown in the recognition of exceptions to the

rule. But the rule itself must be considered firmly settled in the common law, that the vendor of goods which the purchaser has, at the time of purchase, the opportunity of examining, is not responsible for defects of quality, in the absence of fraud and warranty; and although no particular form of words is requisite to constitute a warranty, yet a simple commendation of the goods, or a representation that they are of a certain quality does not make a warranty, unless the language of the vendor, taken in connection with the circumstances of the sale, fairly implies an intention, on his part, to be understood as warranting. The rule has been thus laid down by this Court in several cases: Towell *v.* Gatewood, 2 Scam. 22; Adams *v.* Johnson, 15 Ill. 345, and Kohl *v.* Linder, 39 Id. 195. In the last case the rule is fully considered.

But, although these instructions would be erroneous if applied to ordinary sales of personal property open to inspection, yet they must be considered in reference to their application to this particular case, and, tried by that standard, we cannot say they mislead the jury. As stated by this Court in Kohl *v.* Linder, above quoted, one of the exceptions to the general rule is, where the sale is made by sample, and another, where the purchaser has no opportunity for inspection. The bulk must be as good as the sample, and, if there is no opportunity for examination, the article sold must be what the vendor represents it to be. In such cases the maxim *caveat emptor* can have no application.

In the case before us the proof shows that the 110 barrels were piled up in tiers at a railway depot in Chicago. The purchaser went with the clerk of the plaintiffs to look at them. They opened a couple of barrels that stood on the floor. The purchaser was lame from rheumatism, and requested the clerk to climb up and open a barrel on the top of the tiers. He did so, and showed the purchaser some apples which were in good condition, and said they were all like that. The plaintiffs had told the defendant the apples were just such as he had previously bought, shipped by the same man, and good hand-picked fruit. The apples in the three barrels exhibited as samples were unquestionably merchantable, or the defendant would not have bought. It would be unreasonable to require

that he should have opened every one of the 110 barrels. He had the right to rely on the samples shown to him, and on the representations of the plaintiffs that the apples were good. He had no opportunity for the exercise of his own judgment, and the plaintiffs must have known that he bought relying upon their representations. The case falls clearly within the exceptions to the general rule above mentioned, and there is no ground for saying *caveat emptor*. The verdict was just, and the instructions as applied to the facts of this case could not have misled the jury.

The plaintiffs' instructions were properly refused, because inapplicable to the facts of this case. They would have tended to mislead the jury.

The judgment must be affirmed.

Judgment affirmed.

DARLINGTON, P. P., 84; Fraley *v.* Bispham, 10 Pa. St. 320; Boothby *v.* Plaisted, 51 N. H. 436; Bradford *v.* Manly, 13 Mass. 139; Gould *v.* Stein, 149 Mass. 570; Laing *v.* Fidgeon, 6 Taunt. 108. Warranty as to kind, but not as to quality—Boyd *v.* Wilson, 83 Pa. St. 319.

Marsman v. Chapman
and 334

e.

Implied warranty as to *Kind* or *Species* of chattel ordered or described.

WOLCOTT, JOHNSON & CO. *v.* MOUNT.

Court of Errors and Appeals, New Jersey, 1875.

38 N. J. Law, 496.

BEASLEY, Chief Justice. The plaintiffs in error sold to the defendant in error certain seed as and for "early strap-leaf red-top turnip seed." The seed, being planted, turned out to be of a different kind, so that the defendant lost his crop. It was shown in the case that the plaintiffs in error believed, at the time of the sale, that the seed was of the kind which the defendant sought to purchase. The defendant in error brought his suit before a justice, on the ground that the sale to him, under

these conditions, comprised a warranty. The decision was in his favor, and such judgment was affirmed in the Common Pleas, and, on *certiorari*, in the Supreme Court.

Therefore, the point before this Court now is, whether, on the facts stated, the Court of Common Pleas could lawfully infer that the plaintiffs in error warranted the article sold to be of the particular kind for which it was purchased.

The subject of warranty, in its application to the class of cases in which the present one is comprehended, has been involved in much confusion. The authorities are not consistent, and they are very numerous. It has always seemed to me that a considerable part of this contrariety has arisen from a misapprehension with respect to what was decided in the famous case of Chandler *v.* Lopus, Cro. Jac. 4. The only question in that case, as I understand it, was as to the sufficiency of the averments in the declaration. The plaintiff's case appearing upon the record, is stated in the report in these words, viz.: "Whereas, the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezoar stone, and sold it to him for a hundred pounds; *ubi revera*, it was not a bezoar stone." The contention in the Court of Error, upon this record, was that enough did not here appear to charge the defendant, because it was shown neither that he warranted it to be a bezoar stone, nor knew it to be not such. Instead of a warranty being expressly laid in the declaration, a mere affirmation as to the kind of article sold was laid, and it was this form of pleading which was adjudged to be bad. Now, an affirmation of this kind may or may not be a warranty, according to circumstances, and the fault of the pleading, therefore, was that instead of a warranty it set forth inconclusive evidence of a warranty. The pleader was bound to state the transaction according to its legal effect, and this was all that was decided. And such a form of statement, at the present day, would, I think, be deemed ill.

But this decision has been many times cited, not as an illustration of the rule of pleading, but as an example of the insufficiency of the affirmation specified in the case to prove a contract of warranty; and this, in my opinion, is an evident misuse of the precedent, which has been introductive of con-

fusion. It was such abuse that resulted in the judgment in Seixas *v.* Woods, 2 Caines' R. 48, which asserted that a warranty would not arise from a description of the kind of the article sold. This decision was followed by several others in a similar vein; but the ground upon which this line of cases rested, after being much criticised and discredited, has been formally repudiated by the Court of Appeals of New York in Hawkins *v.* Pemberton, 51 N. Y. 198.

The tendency of recent adjudications has been, I think, to put this subject on a reasonable footing. Starting from the admission that, in the absence of fraud and of a warranty, the rule of *caveat emptor* applies, the effort is, not to elevate particular expressions contained in a given contract into a general rule of law, but to regard each case in the light of its own circumstances, and with respect solely to the understanding of the parties. Whether the representation or affirmation accompanying a sale shall be regarded as a warranty or as *simplex commendatio*, is a question to be solved by a search for the intention of the contracting parties. The two cases of Jendwine *v.* Slade, 2 Espinasse, 572; and Power *v.* Barham, 4 A. & E. 473, 31 Eng. Com. Law, 115, are conspicuous examples of this rule. In the former there was a sale shown of two pictures, the catalogue of the auction describing one as a sea piece, by Claude Lorraine; and the other, a fair, by Teniers. This description was held by Lord KENYON to be no warranty that the pictures were the genuine works of the artists referred to, but merely an expression of the opinion of the vendor to that effect. In the other case, it appeared that, at a sale of four pictures, they were described as "four pictures, views in Venice—Canaletto," and it was left to the jury to decide whether the intention was to warrant the pictures as authentic, the Court distinguishing this case from the former one by the circumstance that Canaletto was comparatively a modern painter, the authenticity of whose works was capable of being known as a *fact*, while, with respect to the productions of very old painters, an assertion as to their genuineness was necessarily a matter of opinion. In these instances the respective affirmations of the vendor were of equivalent import, intrinsically considered; but it was left open, as a matter of inference, whether they

were to have the same signification when used under variant circumstances. The question consequently is, in every case of this kind, whether the conditions were such that the vendee had the right to understand, and did so understand, that an affirmation or representation made by the vendor was meant as a warranty.

And for the determination of this question, Mr. Benjamin, in his admirable Treatise on Sales, page 499, says: "A decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not."

This criterion is the product of the learned author's study of the English decisions, and it appears to me to be the most satisfactory one which can be adopted. It is exemplified in a vast number of cases, many of which are collected in the treatise just referred to, and in the voluminous notes upon the case of Chandler *v.* Lopus, 1 Smith's Lead. Cas. 238. It does not seem to me expedient further to refer, on this point, to the books, contenting myself with the single observation that the before-cited case of Hawkins *v.* Pemberton, 51 N. Y. 198, is in all respects applicable to the facts now present.

Resorting, then, to the principle and test just propounded, it is manifest that the judgment of the Supreme Court cannot be disturbed. The Court of Common Pleas, in weighing the evidence, had a right to infer that a warranty of the character of the article sold was within the understanding of the contracting parties. The seller in this case asserted, at the time of the sale, that the seed was of the species which the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distinguished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own observation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an

expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion, under the circumstances in evidence, I think the Court, although it was not bound so to do, had the right to infer that there was a warranty.

The second question raised in the cause respects the measure of damages. The rule applied in the Court below made the plaintiff whole, as he was allowed to recover the difference between the value of the crop produced and the crop which would have been produced if the seed had been answerable to the warranty. This embraces profits, and the contention was, that profits are too remote and uncertain to constitute an ingredient in the recompense which the law gives on a breach of contract.

But this argument comprises a latitudinarian and incorrect statement of the legal rule. Profits sometimes are not, in a legal point of view, either remote or uncertain. Where the situation of the parties is such that, supposing their attention to have been directed to the contingency, they must have perceived, at the time of the making of the contract, that its breach would probably result in the loss of definite profits, such profits being of an ascertainable nature, the compensation which the law affords to the injured party will embrace these profits. The leading case on this subject, and one which was approved of in this Court in Binninger *v.* Crater, 4 Vroom, 513, is that of Hadley *v.* Baxendale, 9 Exchq. R. 341. The action was for the non-performance of a contract, and the rule is thus defined by the Court: "We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be either such as may fairly and substantially be considered as arising naturally—*i. e.*, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special cir-

cumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The rule thus stated has been approved of and followed in a numerous series of decisions by both the English and American Courts, as is abundantly shown by Mr. Sedgwick in his valuable work on Damages, page 79 (sixth edition).

The present case falls clearly within the scope of this principle. The defendant at the time of the sale was possessed of all the facts—he knew the business of the plaintiff, and the use to be made of the thing sold. He was in a situation to foresee, with entire certainty, the loss that would fall upon the plaintiff if the warranty should be broken. Nor are the gains which have been lost subject to any uncertainty. The seed sold was planted and came to maturity; the seed stipulated for would have done the same, only the value of the product would have been, to a definite amount, greater. In such an injury there is nothing speculative or contingent. There are a number of authorities which sanction the recovery of profits of a much more uncertain character than these: Davis *v.* Talcot, 14 Barb. 611; Griffin *v.* Colver, 16 N. Y. 489; Borries *v.* Hutchinson, 18 C. B. (N. S.) 445, 114 Eng. Com. Law; Messmore *v.* N. Y. Shot and Lead Co., 40 N. Y. 422.

The judgment should be affirmed.

Gould *v.* Stein, 149 Mass. 570;
Borrekins *v.* Bevan, 3 Rawle, 23, 168;
Hawkins *v.* Pemberton, 51 N. Y. 198;
VanWyck *v.* Allen, 69 N. Y. 61;
White *et al. v.* Miller *et al.*, 71 N. Y. 118;
Henshaw *v.* Robins, 9 Met. 83;
Moorehouse *v.* Comstock, 42 Wis. 626.
But see Cosgrove *v.* Bennett, 32 Minn. 371; Goulds *et al. v.* Brophy, 42 Minn. 109.

Sale "with all faults."

WHITNEY *v.* BOARDMAN.

Supreme Court of Massachusetts, 1875.

118 Mass. 242.

DEVENS, J. The expression in the contract, by which the defendants agreed to purchase the Cawnpore buffalo hides with "all faults," was one of such a character that, if in common use and having a well-established meaning in the trade in such articles, such meaning might properly be shown. It is not necessary that terms should be technical, scientific or ambiguous in themselves in order to entitle a party to show by parol evidence the meaning attached to them by the parties to the contract: Whitmarsh *v.* Conway Ins. Co., 16 Gray, 359; Miller *v.* Stevens, 100 Mass. 518; Swett *v.* Shumway, 102 Id. 365. Nor does it appear by the exceptions that any evidence was admitted that gave to these words any meaning different from that which the presiding Judge attributed to them in the instruction given by him, based upon the hypothesis that the jury might find that there was no meaning determined by the general usage of trade. This instruction substantially was that while the plaintiffs must prove that the hides were "Cawnpore buffalo hides," known and sold as such, yet if the defendants got the articles contracted for, having agreed to take them "with all faults," they were bound to take them with "all defects arising in any way either from defects in the cure, or in the packing, or in the shipping or transporting of the hides, not however included in the term sea damage." For the contingency of damage by sea an allowance was to be made, according to the contract, in the price. The defendants argue that this instruction was defective, and that it was not only necessary for the plaintiffs to show that these were Cawnpore hides, but also that they were "properly cured as such hides should be cured, properly packed and of merchantable quality."

But the phrase "with all faults," cannot be limited, as the defendants contend, "to all such faults or defects as the thing

described ordinarily has." That would be to deprive it of force entirely. Its meaning is such faults or defects as the article sold might have, retaining still its character and identity as the article described. The authorities cited by the defendants sustain this view, and not the one contended for by them. Thus, in Shepherd *v.* Kain, 5 B. & Ald. 240, 7 Eng. Com. Law, cited in Henshaw *v.* Robins, 9 Met. 83, it was held that in the sale of a copper-fastened vessel "with all faults," the term meant such faults as a copper-fastened vessel might have, but that it would not cover the sale of a vessel not copper-fastened. The only other authority cited by the defendants on this point is Schneider *v.* Heath, 3 Camp. 506, which decides no more than that "to be taken with all faults," cannot avail a vendor who knew of secret defects and used means to prevent the buyer from discovering them. A similar limitation was given by the presiding Judge in the present case. Nor, if the phrase "with all faults" had not been in the contract, it is easy to see how the defendants could have demanded anything more than the article bought by them should answer the description of "Cawnpore buffalo hides:" Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Boardman *v.* Spooner, 13 Allen, 353, 359.

The defendants further contend that the rule of damages given by the Court, which was the contract price, deducting therefrom the net proceeds of the auction sale of the hides made by the plaintiffs, was erroneous. But by no other rule would the plaintiffs have been indemnified for their loss by the non-compliance of the defendants with their contract. They were not obliged to keep the goods, and if they sold them, the expenses of such sale constitute a charge upon them caused by this non-compliance, whether it was a private sale or one by auction. Of the intention of the plaintiffs to sell at auction the defendants were notified; it does not appear to have been an unusual mode of disposing of such goods; and, having violated their contract, the defendants cannot complain of the expenses which have thus been occasioned.

Exceptions overruled.

Whitney *v.* Boardman, 118 Mass. 242;

Hanson *v.* Edgerly, 29 N. H. 343;

Pearce *v.* Blackwell, 12 Ired. L. 49;

Ward *v.* Hobbs, 4 App. Cas. 13.

REMEDIES.

a.

Of Seller.

Failure to perform.

DUSTAN *v.* MCANDREW.

Court of Appeals, New York, 1870.

44 N. Y. 72.

EARL, C. The contract required that the hops should be inspected by J. S. Brown, or some other inspector satisfactory to both parties. In case J. S. Brown could not or should not inspect them for any reason, then they were to be inspected by some other person mutually satisfactory. Neither party had the right to demand any other inspector, unless Brown neglected or refused to inspect. It is doubtless unusual to insert a stipulation in contracts, that the vendor shall inspect the goods sold. But where parties agree to this, they must be bound by their contract, and it must be construed the same as if some other person had been chosen inspector.

It is claimed on the part of the respondent, and was held by the Court below, that the inspection provided for was intended simply for the convenience of the vendors, to enable them to perform their contract, and that it merely furnished *prima facie* evidence that the hops answered the contract, and that the inspection was not conclusive upon the parties. I cannot assent to this. The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine, for the benefit of both parties, whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and when so delivered, the vendors were entitled to the purchase price. The inspection was thus, as much for the convenience and benefit of one party as the other. Its purpose, like similar

provisions in a variety of contracts, was to prevent dispute and litigation at and after performance. But if the inspection was merely for the convenience of the vendors, then they could dispense with it, and compel the vendees to take the hops without any inspection whatever. And if it was merely *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated.

The inspection could be assailed for fraud, or bad faith in making it, and perhaps within the case of McMahon *v.* The New York & Erie Railroad Co. (20 N. Y. 463), because made without notice to the vendee. The inspection here was made without notice; but it is not necessary to determine whether this renders it invalid, as no such defence was intimated in the answer or upon the trial.

By the purchase of the contract the defendants were substituted, as to its performance, in the place of the vendee therein named, and were bound to do all that he had agreed to do or was bound in law to do. When notified that the hops were ready for delivery they declined to take them, upon the sole ground that they had not had an opportunity to examine or inspect them; and they claimed that they had sent one Smith to inspect them, and that he had been declined permission to inspect them. There was no proof, however, that they ever tried to examine or inspect the hops, or that the vendors ever refused to permit them to examine or inspect them. They sent Smith to inspect them, and he went to one of the several storehouses where some of the hops were stored, and he says he was there refused an opportunity to inspect them by Mr. A. A. Brown. But there is no proof that he was in any way connected with the vendor, or that he had any agency or authority whatever from them. There was no proof that defendants ever tried with the vendors to agree upon any other inspector, or that they ever asked the vendors to have the hops inspected by any other inspector, and they made no complaint at any

time that they were inspected without notice to them. The point that they should have had notice of the inspection was not taken in the motion for a nonsuit, nor in any of the requests to the Court to charge the jury. If the point had been taken in the answer or on the trial, the plaintiff might, perhaps, have shown that notice was given by the vendors, or that it was waived.

Hence we must hold, upon the case as presented to us, that there was no default on the part of the plaintiff or the vendors, and that the defendants were in default in not taking and paying for the hops. The only other question to be considered is, whether the Court erred in the rule of damages adopted in ordering the verdict.

The Court decided that the plaintiff was entitled to recover the difference between the contract price and the price obtained by the plaintiff upon the resale of the hops, and refused, upon the request of the defendants, to submit to the jury the question as to the market value of the hops on or about the 30th day of November.

The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price: 2 Parsons on Con., 484; Sedgwick on Dams., 282; Lewis *v.* Greider, 49 Barb. 606; Pollen *v.* Le Roy, 30 N. Y. 549. In this case the plaintiff chose and the Court applied the second rule above mentioned. In such case, the vendor is treated as the agent of the vendee to make the sale, and all that is required of him is, that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence. Here it is conceded that

the sale was fairly made; it was made in the city of New York, in less than one month from the time the defendants refused to take the hops. It was not claimed on the trial that the delay was unreasonable, and we can find nothing in the case to authorize us to hold that it was unjustifiable. We are, therefore, of the opinion, that the Court did not err as to the rule of damages.

The judgment should, therefore, be affirmed with costs.

"STOPPAGE IN TRANSITU."

LOEB *et al. v.* PETERS *et al.*

Supreme Court of Alabama, 1879.

63 Ala. 243.

MANNING, J. Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco; which they accordingly sent as directed to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brother indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterwards, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco *in transitu*, demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods. Whereupon, the suit was prosecuted against them, to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this Court.

We do not concur in the opinion expressed in Rogers *v.* Thomas (20 Conn. 54), that a vendor of goods, in transit to an insolvent vendee, cannot stop them on the way, before delivery,

unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the Supreme Court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale: Benedict *v.* Schuettic, 12 Ohio St. 515; Reynolds *v.* Boston & M. R. R. Co., 43 N. H. 589; O'Brien *v.* Norris, 16 Md. 122; Blum *v.* Marks, 21 La. Ann. 268. The best definition of the right which we have seen is that in Parson's Mercantile Law, as follows: "A seller, who has sent goods to a buyer at a distance, and, after sending them, finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage *in transitu.*" Chap. X, p. 60.

If, before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith, and for value, the right of the first vendor to retake them is extinguished: Lickbarron *v.* Mason, 1 Smith's Lead. Cases, 388. Evidence, therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not *bona fide* purchasers. And there was no error in permitting a witness to testify what one of that firm had previously said, tending to show such knowledge, when he was giving evidence in another cause. Statements and declarations, relevant to the matter in hand, which have been made by a party to a cause, may be proved against him, without his adversary being compelled to use such party as a witness in a suit in which he is interested.

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency; and the evidence of those facts was, therefore, properly admitted.

The transfer of a bill of lading, as a collateral to previous

obligations, without anything advanced, given up, or lost on the part of the transferree, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage *in transitu*. Said BRADLEY, Circuit Justice, in Lesassier *v.* The Southwestern, 2 Woods, 35: "Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu;* and hence it has been held, that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and, consequently, takes subject to the exercise of any right of stoppage *in transitu* which may exist against the assignor: Harris *v.* Pratt, 17 N. Y. 249." Wherefore it was held in the latter case, that an attachment in the suit of the vendee's creditor, of goods landed by the carrier upon a wharf-boat at the place of delivery, did not prevent the vendor from stopping them *in transitu*. See, also, O'Brien *v.* Norris, 16 Md. 122; Naylor *v.* Dennie, 8 Pick. 199; Nicholls *v.* Lefeuvre, 2 Bingh. (N. C.) 81, 29 Eng. Com. Law. The doctrine is based upon the plain reason of justice and equity, enunciated in D'Aguila *v.* Lambert (2 Eden's Ch. 77), that "one man's property should not be applied to the payment of another man's debt." The right itself is regarded as an extension merely of the lien for the price, which the seller of goods has on them while remaining in his possession; which lien the Courts will not permit to be superseded before the vendee, who has become insolvent, obtains possession, unless, in the meantime, the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser *by his purchase*, if that were held invalid. Appellants having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to *debit* them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title.

The case of Crawford *v.* Kirksey (55 Ala. 282), so much relied on by appellants, is wholly unlike this. The question of stoppage *in transitu* was in no way involved in it. The controversy there, was whether a conveyance by a debtor in a failing condition of property which was indisputably and entirely his, in payment of a debt to one of his creditors, was

not void as to the others; and this Court decided, that the law permitted such a preference, and that the transaction was not fraudulent in fact.

It results from what we have said, that there was no error in the charges to the jury.

Let the judgment of the Circuit Court be affirmed.

b.

Of Buyer.

For Non-delivery.

WHITMARSH *v.* WALKER.

Supreme Judicial Court of Massachusetts, 1840.

1 Met. 313.

WILDE, J. This action is founded on a parol agreement, whereby the defendant agreed to sell to the plaintiff two thousand mulberry trees at a stipulated price; the trees, at the time of the agreement, being growing in the close of the defendant. It was proved at the trial, that the plaintiff paid the defendant in hand the sum of ten dollars, in part payment of the price thereof, and promised to pay the residue of the price on the delivery of the trees, which the defendant promised to deliver on demand; but which promise, on his part, he afterwards refused to perform. And the defence is that the contract was for the sale of an interest in land, and therefore void by the Rev. Sts., c. 74, § 1.

In support of the defence, it has been argued, that trees growing, and rooted in the soil, appertain to the realty, and that the contract in question was for the sale of trees rooted and growing in the soil of the defendant at the time of the sale. On the part of the plaintiff it was contended, that the trees contracted for were raised for sale and transplantation, and, like fruit trees, shrubs, and plants rooted in the soil of a nursery garden, are not within the general rule, but are to be considered as personal chattels. This question was discussed and considered in Miller *v.* Baker (1 Met. 27), and we do not

deem it necessary to reconsider it in reference to the present case. We do not consider the agreement set forth in the declaration and proved at the trial as a contract of sale consummated at the time of the agreement; for the delivery was postponed to a future time, and the defendant was not bound to complete the contract on his part, unless the plaintiff should be ready and willing to complete the payment of the stipulated price: Sainsbury *v.* Matthews, 4 Mees. & Welsb. 347. Independently of the Statute of Frauds, and considering the agreement as valid and binding, no property in the trees vested thereby in the plaintiff. The delivery of them and the payment of the price were to be simultaneous acts. The plaintiff cannot maintain an action for the non-delivery, without proving that he offered and was ready to complete the payment of the price; nor could the defendant maintain an action for the price without proving that he was ready, and offered, to deliver the trees. According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the Statute of Frauds.

This subject was fully considered in the case of Taylor *v.* Waters, 7 Taunt. 374, 2 Eng. Com. Law; and it was held that a beneficial license, to be exercised upon land, may be granted without deed, and without writing; and that such a license, granted for a valuable consideration, and acted upon, cannot be countermanded. The subject has also been ably and elaborately discussed by Chief Justice Savage, in the case of Mumford *v.* Whitney, 15 Wend. 380, in which all the authorities are reviewed; and we concur in the doctrine as therein laid down, namely, that a permanent interest in land can be transferred only by writing, but that a license to enter upon the land of another and do a particular act or a series of acts, without transferring any interest in the land, is valid, though

not in writing. And such is the license on which the plaintiff relies in the present case.

Chancellor KENT, in his Commentaries (Vol. III., p. 452, 3d ed.), very justly remarks, that "the distinction between a privilege or easement carrying an interest in the land, and requiring a writing, within the Statute of Frauds, to support it, and a license which may be by parol, is quite subtil, and it becomes difficult, in some of the cases, to discern a substantial difference between them." But no such difficulty occurs in the present case. The plaintiff claims no right to enter on the defendant's land by virtue of the license. It is admitted that he had a legal right to revoke his license. But if he exercised his legal right in violation of his agreement, to the plaintiff's prejudice, he is responsible in damages. We think it, therefore, clear that giving to the contract the construction already stated, the plaintiff is entitled to recover. If, for a valuable consideration, the defendant contracted to sell the trees and to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it, and if he refused to comply with his agreement, he is responsible in damages.

Judgment on the verdict.

RESCISSION.

ROBSON *v.* BOHN.

Supreme Court of Minnesota, 1876.

22 Minn. 410.

BERRY, J. This is an appeal from an order granting a new trial. In assigning reasons for the order, it is said by the Court below that the motion for the new trial is made "upon the ground, chiefly, that the findings of fact are against the evidence." Upon that ground, as we understand it, the Court below has proceeded in granting the new trial, and in laying down rules of law applicable, not to the facts as found by the referee, but to the somewhat contrary state of facts which, in

the opinion of the Court below, the evidence in the case tends to establish.

By the terms of the written contract between the parties the plaintiff was bound to furnish at least 200,000 feet of lumber before the 1st day of August. The referee finds, and the plaintiff claims here, that the plaintiff did furnish that amount before that time, thus fulfilling the agreement upon his part up to that date. But the bills made out by plaintiff and handed to defendant, and which, as is shown by the evidence, contain a full account of all the lumber furnished under the contract, do not sustain the referee in his finding. On the contrary, they show that the plaintiff had furnished less than 194,000 feet before the 1st day of August, and that, therefore, he had failed to fulfill his contract. The plaintiff was, therefore, guilty of the first default, and as he had thus failed to perform the contract upon his part, and as he refused to go on and perform it, the defendant had the right, if he saw fit, to treat the contract as at an end, and to refuse to make the $2000 payment, which, by the terms of the contract, he had bound himself to make on the 1st day of August. The defendant took this course, as the evidence in the case shows.

Under this state of facts we think that the Court below is right in saying that the "contract not having been performed by either of the parties, and having been abandoned by both of them, the plaintiff must recover, if at all, upon defendant's implied contract to pay the value of the lumber received and kept by him:" 2 Smith Lead. Cas. (6th Am. ed.) 30, 40. In applying this rule to the case we are of opinion that the Court below was right in holding that the evidence showed the value of the lumber received by defendant to be considerably less than the contract price, and, of course, in further holding that the referee erred in allowing such contract price.

As to the 6000 feet of roofing referred to in the opinion of the Court below, it is unnecessary to speak, as the case goes back for a new trial.

We are further of opinion that the Court below was right in reference to the effect of the rendition of the daily bills of lumber furnished outside of the contract before spoken of. The counsel for plaintiff contends that the rendition of daily

bills of lumber furnished under the contract should have the same effect—that is to say, that the bills should stand upon the footing of accounts stated.

If received and kept without objection by defendant, they might very properly have the effect of accounts stated, so far as the question of the quantities of lumber therein mentioned was concerned; but, so far as prices are concerned, they could not have the effect of accounts stated, not only because the bills contain no prices or amounts in dollars and cents, but because the bills were furnished under a then existing contract as to prices, which contract has been abandoned by both parties, as the Court below finds.

Order affirmed.

REPLEVIN.

SCUDDER *v.* WORSTER *et al.*

Supreme Judicial Court of Massachusetts, 1853.

11 Cush. 573.

DEWEY, J. This case is submitted upon an agreed statement of facts, upon which the Court are to enter judgment. The first question presented, that of proper pleadings and specification of defence, would have been more properly raised, had the case taken the ordinary course of a trial by jury. By making a statement of facts, and asking the judgment of this Court thereon, the parties are understood to have waived all questions as to the formal pleadings, unless those questions are in direct terms reserved. For obvious reasons, this ought to be so, as the opportunities for amendments of the pleadings would be much greater, and they could be more conveniently allowed in the earlier stages of the case. The precise objection taken by the plaintiff as to this matter is, that the defendants by pleading the general issue without a specification alleging the property in themselves in the articles replevied, admit the property in these articles to be in the plaintiff, and deny only the taking of the same.

If this were so, yet in a case when the right of property was

in fact the real matter in controversy, and the defendant had through some misapprehension omitted to set forth his claim of right of property, an amendment ought to be allowed to that effect, upon proper terms, if on trial before a jury, or the facts discharged and the case sent to trial, if the case were submitted to the Court upon an agreed statement of facts, if it were necessary to secure the defendant a hearing upon the merits of the case. But in the present case we think the right of the defendants to assert their property in the articles replevied is not concluded by the form of the pleadings; first, for the reason already assigned, that the parties have made a case upon a statement of facts, and thus waived the objection as to the form of the pleadings; and, secondly, because under our statute of 1836, *c.* 273, abolishing special pleading, and allowing no other plea than the general issue, that was properly pleaded, and no call having been made for any specification of defence, and no objection taken to its omission, until the argument was heard here upon the statement of facts, it was too late to raise the point: Miller *v.* Sleeper, 4 Cush. 369. Nor can the plaintiff aid his case by reference to his writ commanding the officer to replevy 150 barrels of pork, "the property of the plaintiff," and the return indorsed thereon by the officer that "he had replevied the within-mentioned property." An officer's return, however conclusive as to the service of process, settles nothing of the right of property of the parties. This case must be decided upon the result we shall come to upon the principal question so fully argued, whether the property in the 150 barrels of pork ever passed from the vendors by a sale so far complete as to authorize the plaintiff to maintain his action of replevin for the same.

It appears from the facts stated, that on February 10, 1850, a contract was made by the defendants with Secomb, Taylor & Co., to sell them 250 barrels of pork branded "Worcester and Hart;" that a bill of sale of the pork was made and delivered to them, and they gave the defendants their negotiable promissory notes of hand therefor, payable in six months; that it was further agreed that the pork should remain in defendants' cellar on storage, at the risk and expense of the purchasers; that Secomb, Taylor & Co., on the 13th of May, 1850, sold 100

barrels of the pork to one Lang, who received the same of the defendants upon the order of Secomb, Taylor & Co.; that on the 27th of May, 1850, Secomb, Taylor & Co. sold the plaintiff 150 barrels, with an order on the defendants therefor. The next day the plaintiff gave notice to the defendants of the purchase, and requested them to hold the same on storage for him, to which the defendants assented. On the 25th of June, Secomb, Taylor and Company became insolvent, and on the same day the plaintiff called upon the defendants for the purpose of recovering the 150 barrels of pork, but the defendants refused to allow him to do so. On the next day a more formal demand, accompanied by an offer to pay storage, was made, which being refused by the defendants, an action of replevin was instituted, and 150 barrels of pork, the same now in controversy, were taken and removed from said cellar and delivered to the plaintiff.

The further fact is stated in the case, and it is this which raises the question of property in the plaintiff, that the pork bargained and sold in the manner above stated was in the cellar of the defendants, and a parcel of a larger quantity of the same brand, and also with some of a different brand, and so continued parcel of a larger quantity of similar brand, up to the time of the suing out of the plaintiff's writ of replevin: though this fact was not at the time of the sale stated to the purchasers, or to the plaintiff when he purchased of Secomb, Taylor & Company. Had these 250 barrels of pork been a separate parcel, or had the parties designated them by any visible mark, distinguishing them from the residue of the vendor's stock of pork, the sale would clearly have been an absolute one, and the property would at once have passed to the purchaser. There was nothing required to have been done but this separation from the general mass of like kind to have placed the sale beyond all question or doubt as to its validity.

The cases cited by the plaintiff's counsel fully establish the position, that what was done in this case would have transferred the property in the pork, if the sale had been of all the pork in the cellar, or of any entire parcel separated from the residue, or if the 250 barrels had some descriptive mark distinguishing them from the other barrels not sold. The diffi-

culty in the case is, in maintaining that in the absence of each and all these circumstances, distinguishing the articles sold, the particular barrels of pork selected by the officer from the larger mass when he served this process, were the property of the plaintiff, or had ever passed to him. In addition, however, to the numerous cases cited to establish the general principles contended for on the part of the plaintiff, and which would have been decisive, if it had been a sale of all the pork in the cellar, or a particular parcel, or certain barrels having descriptive marks which would enable the vendee to separate his own from the residue, were cited several more immediately bearing upon the present case, and were properly not separable, has been held to pass to the vendee. The leading case relied upon is that of Pleasants *v.* Pendleton, 6 Rand. 475. This was an action by the vendor to recover the price of 119 barrels of flour sold to the defendant. No other objection existed to the validity of the sale, except that the 119 barrels were a parcel of 123 barrels, all of similar kind, in the same warehouse. There were certain brands or marks on the entire 123 barrels. The flour was destroyed by fire while on storage, and the vendee refused to pay for the 119, upon the ground that the sale was not perfected for want of separation from the 123 barrels. The Court refused to sustain the defence, and gave judgment for the plaintiff. In reference to this case GRIMKE, J., in Woods *v.* McGee, 7 Ohio, 127, says, "it is impossible to divest ourselves of the impression that the small difference between the aggregate mass and the quantity sold, the former being 123 barrels and the latter 119, may have influenced the decision. It was a hard case, and hard cases make shipwreck of principles."

Jackson *v.* Anderson, 4 Taunt. 24, was an action of trover to recover for the conversion of 1969 Spanish dollars. It appeared that the amount had been transmitted to a consignee for the use of the plaintiff, but they were in a parcel of $4918, all of which came into the hands of the defendant. Among other points raised at the argument was this, that there was nothing to distinguish the $1969 from the entire mass; that there had been no separation, and of course the plaintiff had no property in any particular portion of the money. The point, it seems,

was not made at the trial before the jury, but suggested by the Court during the argument before the full Court, and this is stated by the reporter; the Court interrupted the counsel, and intimated a strong doubt, as there was nothing to distinguish the $1969 from the remaining contents of the barrel, whether the action could lie. At a future day the Court gave judgment for the plaintiff. The objection was overruled upon the ground that the defendant had disposed of all the dollars, consequently he had disposed of those belonging to the plaintiff.

The case of Gardner *v.* Dutch, 9 Mass. 427, is apparently the strongest case in favor of the plaintiff. The case was replevin against an officer who had attached goods as the property of Wellman and Ropes. The plaintiff had 76 bags of coffee, to which he became entitled as owner, upon an adjustment of accounts of a voyage he had performed for Wellman and Ropes, but the bags belonging to the plaintiff were in no way distinguished by marks, or separated from the other coffee of Wellman and Ropes. The plaintiff on his arrival at Salem, from his voyage, delivering the entire coffee to Wellman and Ropes, taking their receipt "for 76 bags of coffee, being his adventure on board schooner Liberty, and which we hold subject to his order at any time he may please to call for the same." The point taken in the case was that the plaintiff had not the sole property, but only an undivided interest, and so could not maintain replevin. The Court ruled that the plaintiff was not a tenant in common, but might have taken the number of bags to which he was entitled, at his own selection, and might maintain his action.

This case, on the face of it, seems to go far to recognize the right of one having a definite number of barrels of any given articles mingled in a common mass, to select and take, to the number he is entitled, although no previous separation had taken place. It is, however, to be borne in mind in reference to this case, that it did not arise between vendor and vendee. The interest in the 76 bags of coffee did not originate by purchase from Wellman and Ropes. They became the specific property of the plaintiff in that action, on an adjustment of an adventure, the whole proceeds of which were in his hands, and separated with the possession, only when he took their ac-

countable receipts for 76 bags, held by them on his account. It did not raise the question, here so fully discussed, as to what is necessary to constitute a delivery, and how far it was necessary to have a separation from a mass of articles, to constitute a transfer of title. Perhaps the circumstances may well have warranted that decision, but we are not satisfied that the doctrine of it can be properly applied to a case where the party asserts his title, claiming only as a purchaser of a specific number of barrels, there having been no possession on his part, and no separation of the same from a larger mass of articles similar in kind, and no descriptive marks to designate them.

On the other hand, in support of the position that this sale was never perfected, for want of such separation of the particular barrels on account of the plaintiff, or some designation of them from others of like kind, there will be found a strong weight of authority, and to some of the most prominent cases I will briefly refer. Thus, in the case of Hutchinson *v.* Hunter, 7 Barr, 140, which was an action of assumpsit to recover payment for 100 barrels of molasses sold to the defendant, the same being parcel of 125 barrels, and the whole destroyed by fire while on storage, and before separation or designation of any particular barrels, it was held that the plaintiff could not recover, the sale never having been consummated. ROGERS, J., says: "The fundamental rule which applies to this case is, that the parties must be agreed as to the specific goods on which the contract is to attach, before there can be a bargain and sale. The goods must be ascertained, designated, and separated from the stock or quantity with which they are mixed before the property can pass." He considers the case of Pleasants *v.* Pendleton, 6 Rand. 475, as decided on erroneous principles. The case of Hutchinson *v.* Hunter presented a case of a subcontract or sale like the present, and it was urged that this differed the case from what it might otherwise have been, as respects the original vendor. But the Court held that this did not vary the case in the matter of the necessity of a separation of the article sold from the greater mass. So in Golden *v.* Ogden, 15 Penn. St. R. (3 Harris) 528, where a contract was made for the sale of 2000 pieces of wall paper, the purchaser giving his notes therefor to the vendor, and taking away with

him 1000 pieces, and it was agreed that the other 1000 pieces should remain until called for by the purchaser, upon a question of property in the remaining 1000 pieces between the assignees of the vendor and the purchaser, it was held that these 1000 pieces not having been selected by the buyer, or separated or set apart for him, but remaining mingled with other paper of same description, did not become the property of the alleged buyer, as against an assignment for the benefit of the creditors of the vendor. The principle advanced in that case seems to be the sound one: "That the property cannot pass until there be a specific identification in some way of the particular goods which the party bargains for. The law knows no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards." The case of Waldo *v.* Belcher, 11 Iredell, 609, was the case of a sale of corn by a vendor, having in his store 3100 bushels of corn, and selling 2800 bushels of the same, but the 2800 bushels were never separated from the 3100, and the whole was, after the sale, destroyed by fire, and it was held that the property in the 2800 bushels did not pass to the vendee, though it would have been otherwise had it been a sale of all the corn in the crib. The ground of the decision was, that there had been no separation, that it could not be ascertained which corn was the property of the vendee until it was separated. The purchaser could not bring detinue, because he could not describe the particular thing. This would be equally so as to replevin. The case of Merrill *v.* Hunnewell, 13 Pick. 213, bears strongly upon the question before us. It was a sale of nine arches of brick in a kiln containing a larger number, but not separated from the residue or specifically designated. After the vendor had, by other sales, reduced the quantity on hand to less than nine arches, upon a question of property between the vendee and an attaching creditor of the vendor, it was held that the purchaser took no property in the bricks, the sale being of part of a large mass, not delivered nor specifically designated.

Blackburn, in his Treastise on Sales, p. 20, presents the law on this subject thus: "Until the parties are agreed as to the specific identical goods, the contract can be no more than a con-

tract to supply goods answering a particular description, and since the vendor would fulfill his part of the contract by furnishing any parcel of goods answering that dtscription, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold."

Examining the facts in the case before us, and applying the principles of the cases last cited, and the approved elementary doctrine as to what is necessary to constitute a sale of property not separated from the mass of like kind, or designated by any descriptive marks, the Court are clearly of opinion that the property in the specified 150 barrels of pork taken by the plaintiff, under his writ of replevin, had never passed from the vendors, and therefore this action cannot be maintained.

In the argument of this case on the part of the plaintiff, the case was put as a case of intermixture of goods, and it was argued that such intermixture having taken place, the plaintiff might, for that cause, hold the property as his. But, in fact, there was no such case of intermixture. The entire property was always in the defendants.

It was also urged that the defendants were estopped to deny that the 150 barrels of pork were the property of the plaintiff, having given a bill of sale of the same, and under the circumstances stated in the statement of facts. Had this been an action to recover damages for the value of 150 barrels of pork, this position might be tenable, and the defendants estopped to deny the property of the plaintiff in such 150 barrels. This would be so if an action had been brought against the defendants as bailees of 150 barrels of pork, and for not delivering the same.

But the distinction between the case of an action for damages for not delivering 150 barrels, and that of replevin, commanding the officer to take from the possession of the defendants 150 barrels, and deliver the same to plaintiff as his property, is an obvious one. To sustain the former it is only necessary to show a right to 150 barrels generally, and not any specific 150 barrels; but to maintain replevin, the plaintiff must be the owner of some specific 150 barrels. If bought, they must be

specifically set apart, or designated in some way as his, and not intermingled with a larger mass of like kind owned by the vendor.

Judgment for the defendants.

Haase *v.* Nonnemacher, 21 Minn. 486;
Knoblauch *v.* Kronschnabel, 18 Minn. 300;
Ellis *v.* Andrews, 56 N. Y. 83;
Coplay Iron Co. *v.* Pope *et al.*, 108 N. Y. 232;
Minneapolis Harvester Works *v.* Bonnallie, 29 Minn. 373;
Taylor *v.* Mueller, 30 Minn. 343;
Johnson *v.* Hillstrom, 37 Minn. 122;
Mitchell *v.* Gile, 12 N. H. 390.

EXCHANGE.

Title to property may pass from one party to another by Exchange, as well as by sale, and such title may pass absolutely or upon condition.

Rollins *v.* Wibye.

Supreme Court of Minnesota, 1889.

40 Minn. 149.

Dickinson, J. The plaintiff resides in the State of Iowa; the defendant, in this State. The former owned a stallion called "Montana;" the latter owned one called "Solide." At the plaintiff's place of residence in Iowa—the defendant's horse not being there—the parties entered into an agreement concerning an exchange of the animals. The precise nature of this agreement is a subject of controversy in this action. In the complaint it is alleged that the defendant, among other things, represented his stallion as being sound and healthy; that, relying upon such representations, the plaintiff entered into a contract of exchange, whereby defendant was to take the plaintiff's horse—Montana—with him to Minnesota, and return to the plaintiff's residence in Iowa with his (defendant's) horse—Solide—and deliver him to the plaintiff there, and if, upon such delivery, the defendant's representations should be found true, then the trade was to be complete, and until then

the title should not pass. The falsity of these representations is alleged; it being averred that the defendant's horse was sick, having a contagious disease, of which he died while being transported to Iowa. The defendant, in his answer, denies that he made any representations whatever; denies that any representations made by him were false, that he agreed to deliver his horse in Iowa, and that it was agreed that title should not pass until such delivery, or until any representation should be found true; and avers that the exchange was immediate and complete. It is admitted in the answer that the horse was sick at the time the contract was made, and that he died while on the way to the plaintiff's residence in Iowa. This action is for the recovery of the stallion Montana, which the plaintiff claims as being still his property. It appears from a bill of exceptions that both parties introduced evidence tending to sustain the allegations of their respective pleadings. The Court refused to instruct the jury, as requested by the defendant, that the *only* question in the case was whether the agreement was that the defendant's horse was to be delivered to the plaintiff in Iowa, and that, if such was not the fact, the verdict must be for the defendant. The Court construed the complaint as alleging this further condition to the exchange becoming absolute, viz.: That the horse was at the time of the making of the agreement sound and healthy, as represented; and that this representation should be found to be true when the horse should be delivered. We are of the opinion that the Court was justified in thus construing the complaint, in view, not only of its allegations, but of the fact that the defendant so treats it in his answer. Therefore the refusal to charge as requested was not error. Upon this construction of the complaint, the condition of the horse as to health at the time of the agreement was of course material; but, inasmuch as the answer admits that the horse was sick at the time of the agreement, and that he died before reaching the plaintiff's residence, it does not seem to us to have been necessary for the plaintiff to offer evidence to show the particular nature of the disease, and that it was contagious. However, the appellant's argument upon this point is not based upon the ground that the sickness of the horse was admitted. For no other reason was

that evidence objectionable. It was not prejudicial error to receive such proof, although it was unnecessary.

In this connection, however, immaterial evidence was received, which we are not prepared to say was not prejudicial to the defendant. This evidence was that several persons, whose mares had, as the evidence tended to show, contracted disease from the horse, had complained to the defendant of this prior to the time of the making of the contract in question. The purpose of the Court, as we understand, was to limit the proof of such disease having been contracted by the mares to cases in which the defendant had been notified of such facts, so that he might not be surprised. If it was proper to receive proof that the horse was so affected, the manner in which the proof was made was competent (Steph. Dig. Ev., *c.* 2, art. 9), and it was not necessary to limit the proof of facts going to establish the existence of disease to cases which had been previously brought to the attention of the defendant, and so it was immaterial whether such complaints had been made or not. The possible prejudice lies in the tendency of such evidence to show fraud on the part of the defendant at the time of making the contract, although, as the Court properly ruled, the question of fraud was not involved in the case. The Court instructed the jury as follows: "Now, in case you find this trade was an absolute one—that there were no conditions whatever—then you may leave this testimony in regard to this contagious disease out of the case; but it is proper for you to consider upon this question whether or not it was an absolute or conditional trade; and it is important for you to inquire whether this horse did have this contagious disease or not, and whether Mr. Wibye knew it. If he did, and Mr. Wibye knew it, what bearing has it upon the main question in the case? The force and effect of the testimony is entirely with you, and not with the Court." A proper exception having been taken, error is assigned in respect to that part of this instruction to the effect that it was proper for the jury to consider the evidence of the horse having a contagious disease, as affecting the question as to whether the agreement for an exchange was absolute or conditional. This instruction was, as we consider, error. This evidence would not have been admissible for the purpose of

enabling the jury to determine whether the agreement of the parties to exchange horses was absolute or conditional. The condition of the horse at the time of the agreement would be a matter collateral to that particular issue, and, unless known to both of the contracting parties, would be irrelevant. It would afford no proper ground for an inference, one way or the other, as to whether the contracting parties had agreed upon an absolute or only a conditional exchange. See Roles *v.* Mintzer, 27 Minn. 31 (6 N. W. Rep. 378). It may be that if the defendant knew that the horse was diseased, that would be an inducement to him to dispose of him upon the best terms possible; but he could not alone determine the conditions or terms of a contract of sale or exchange, and the fact in question could add nothing to the probable truthfuluess of the testimony of witnesses as to what terms were actually agreed upon. The case is not within the rule stated in Kumler *v.* Ferguson, 7 Minn. 351 (442), and Schwerin *v.* De Graff, 21 Minn. 354. It is not apparent that the error was harmless, and a new trial must be awarded.

From language appearing in the charge of the Court it may be suspected that the nature of the arguments of counsel to the jury had been such as might have precluded the defendant from now claiming this instruction to have been erroneous; but, if such was the fact, it is not shown by the settled bill of exceptions, and we cannot assume that such was the case.

We discover no other error in the case.

Order reversed.

Vail *v.* Strong, 10 Vt. 457; Edwards *v.* Cottrell, 43 Iowa, 194; Sheldon *v.* Cox, 3 B. & C. 420, 10 Eng. Com. Law. Anonymous Case, 3 Salk. 157; Stevenson *v.* State, 65 Ind. 409.

Points to be looked up.

1/ Effect of Stat. requirements as to sales of coal &c, as to weighing, measuring, branding, etc.

Delivery - Distinction bet. d wh. passes title from vdr to vdee, & actual del. wh. depriv vdr of his rt of stoppage in transitu.
Arnold v. Delano. 50 D. 754

Del. of ponderous articles. 99 A.D. 752 [illegible]
Symbolical. [illegible] 355. / Prices 445.

Cash - Effect of sale for -
check - - payt by } 38 A.S.R. 615.

Bill of lading - effect of - 38 A.S.R. 615

Vendors lien - 7 A.D. 352 x

Warranty - Sutton v. Rhodes. 92 Cal. 117.
By corp'n. Erie City Iron Works v. Barber. 81 A.R. 308
See excellent note 115 A.S. [393]
Remedy - at C. L. & under code. 24 Cal. 458. (1864)

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